Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

NEAL JACOBS, PETITIONER

v.

GEORGE P. VIENER, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent/plaintiff George Viener (plaintiff), brought an action in equity individually and derivatively on behalf of two corporations in which he was a one-third and one-fourth shareholder against, among others, petitioner Neal Jacobs (Jacobs), one of the defendants below, who was also one-third and one-fourth shareholder in these corporations. The trial court held that plaintiff was effectively frozen-out of the corporations, and therefore, in equity awarded plaintiff the value of his stock without a specific finding that Jacobs caused any actual compensatory damages to plaintiff. The trial court also awarded punitive damages to plaintiff. The appellate court affirmed concerning the appropriateness of awarding an equitable remedy of the value of the stock and the appropriateness of awarding punitive damages, however, it remanded the case to allow plaintiff to present additional evidence because the appellate court found that plaintiff's evidence was insufficient to prove the value of the stock:

> Whether a defendant's due process rights are violated when a plaintiff is permitted to recover punitive damages in an action in equity where no showing or finding of actual compensatory damages is made?
>
> Whether a defendant's due process rights are violated when a state appellate court, after it finds plaintiff's evidence to be insufficient to prove an essential element of plaintiff's case, remands the case to allow plaintiff to supplement the trial court record?

PARTIES TO THE PROCEEDING

Petitioner is Neal Jacobs and he was the appellant and defendant below.

Respondent is George P. Viener and he was the appellee and plaintiff below.

Defendants below also included Norman Rush (Rush), Michael A. Joffred (Joffred), Allen Friedman (Friedman), NGN Inc. (the corporations), Reading Garment Company Inc. (RGC), Ellmar Manufacturing Inc. (Ellmar), Nagan Leasing Inc. (Nagan), Energy Knits, Inc. (Energy), Reading Dyeing and Finishing Inc. (Reading Dyeing), Little Creek Mills Inc. (Little Creek), LCMA Inc. (LCMA), Amity Finishing Inc. (Amity) and GNK Partnership (GNK).

Rush, NGN, RGC, Ellmar, LCMA and Reading Dyeing were all adjudicated bankrupt and all proceedings were stayed as to them. At the liability phase of the trial, the trial court dismissed Joffred, Friedman, Nagan, Energy, Reading Dyeing, Little Creek, Amity and GNK as defendants.

No parties other than Jacobs and Viener participated in the damage phase of the trial or the appeals therefrom.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

A. Trial Court Opinion of June 30, 2000 ... Appendix A

B. Trial Court Opinion of April 24, 2001 .. Appendix B

C. Pennsylvania Superior Court Opinion of September 3, 2003. ..... Appendix C

D. Pennsylvania Supreme Court Order of August 16, 2004 ..... Appendix D

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 7

I. PERMITTING PLAINTIFF TO RECOVER PUNITIVE DAMAGES VIOLATED DEFENDANT'S DUE PROCESS RIGHTS BECAUSE NO ACTUAL COMPENSATORY DAMAGES WERE FOUND TO HAVE BEEN CAUSED TO PLAINTIFF DIRECTLY 7

II. IF IT IS DETERMINED BY AN APPELLATE COURT THAT A PLAINTIFF FAILED TO PROVE AN ESSENTIAL ELEMENT OF HIS CASE, A DEFENDANT'S DUE PROCESS RIGHTS ARE VIOLATED IF THE APPELLATE COURT REMANDS THE CASE TO ALLOW PLAINTIFF TO SUPPLEMENT THE TRIAL COURT RECORD. 12

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

BMW of North America v. Gore,
517 U.S. 559 (1996) 8, 9, 10, 11
Bishop v. Osborn Transp., Inc.,
838 F.2d 1173 (11th Cir. 1988) 12
Boddie v. Connecticut,
401 U.S. 371 (1971) 14
Carter Equip. Co. v. John Deere Indus. Equip. Co.,
681 F.2d 386 (5th Cir. 1982) 11
Ford Motor Co. v. Estate of Tommy Smith,
538 U.S. 1028 (2003) 8
Ford Motor Co. v. Romo,
538 U.S. 1028 (2003) 8
Fuentes v. Shevin,
407 U.S. 67 (1972) 13
In Mertens v. Hewitt Associates,
508 U.S. 248 (1993) 12
Judy Ellyn, Inc. v. Hyde Park Fashions, Inc.,
206 Pa. Super. 569, 214 A.2d 296 (1965) 15
Mathews v. Eldridge,
424 U.S. 319 (1976) 13
North Georgia Finishing Inc. v. Di Chem Inc.,
419 U.S. 601 (1975) 13
Pane v. RCA Corp.,
868 F.2d 631 (3d Cir. 1989) 12
Price v. Chevrolet Motor Div. of GMC,
2000 Pa. Super. 410, 765 A.2d 800 (2000) 15
Robertson v. White,
633 F. Supp. 954 (W.D. Ark. 1986) 12

Sage v. Automation, Inc. Pension Plan & Trust,
845 F.2d 885 (10th Cir. 1988) 12
Sisk v. Duffy,
201 Pa. Super. 213, 192 A.2d 251 (1963) 14
Snyder v. Massachusetts,
291 U.S. 97 (1934) 13
State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 7, 8, 9, 10
Varhola v. Doe,
820 F.2d 809 (6th Cir. 1987) 12
Viener v. Jacobs,
51 Pa. D. & C. 4th 260 (Berks Co. 2000) 1, 2
Whiteley v Warden, Wyoming State Penitentiary,
401 U.S. 560 (1971) 14

CONSTITUTIONAL PROVISIONS

14th Amendment to U.S. Constitution 1

STATUTES

28 U.S.C. § 1257(a) 1
29 U.S.C. 1132 (a)(3) 12

OPINIONS BELOW

The following opinions were issued by the courts below and are appended to this Petition:

Trial Court Opinion of June 30, 2000 is reported at 51 Pa. D. & C. 4th 260 (Berks Co. 2000) and is attached as Appendix A.

Trial Court Opinion of April 24, 2001 is reported at 52 Pa. D. & C. 4th 353 (Berks Co. 2001) and is attached as Appendix B.

Pennsylvania Superior Court Opinion of September 3, 2003 is reported at 2003 Pa. Super 324, 834 A.2d 546 (2003) and is attached as Appendix C.

Pennsylvania Supreme Court Order of August 16, 2004 is not reported, but has a LEXIS citation of 2004 Pa. LEXIS 1859 (2004) and is attached as Appendix D.

JURISDICTION

The Pennsylvania Supreme Court, the state appellate court of last resort, denied certiorari on August 16, 2004 and this petition is filed within 90 days of that denial. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

George P. Viener (plaintiff) brought an action in equity individually and derivatively against his fellow shareholders, Neal Jacobs (Jacobs), Norman Rush (Rush), and Allen Friedman (Friedman). Viener also sued NGN, Inc. (NGN), Reading Garment Company, Inc. (RGC) (collectively, the corporations) and eight other companies

in the garment industry. Finally, he sued the then president of the corporations, Michael A. Joffred (Joffred). Viener, Jacobs and Rush were one-third shareholders of the corporations and Viener, Jacobs, Rush and Friedman were one-fourth shareholders of RGC. *Viener v. Jacobs*, 51 Pa. D. & C. 4th 260, 261 (Berks Co. 2000) (Appendix A).

With respect to plaintiff's claims against Jacobs, the trial court dismissed claims for wrongful discharge of employment and conspiracy. However, the trial court determined that Jacobs breached his fiduciary duty by freezing plaintiff out of the corporations. *Id.*

The trial court also determined that Jacobs committed four outrageous acts.

First, the trial court determined that Jacobs used invoices by one vendor to generate cash to pay monies to another vendor, NV Sportswear, a sewing contractor that provided services to the corporations. During this damage phase of the trial, it was shown that these monies were in fact owed to NV Sportswear and were reduced from the sum owed by the corporations to NV Sportswear. Furthermore, plaintiff admitted that these monies were owed to NV Sportswear and credited against the outstanding balance owed to NV Sportswear.

Second, the trial court determined that Jacobs sent the corporations' equipment worth approximately $15,000 to Mexico to a sewing contractor. During the damage phase of the trial, it was shown that the equipment was shipped to a sewing contractor that was performing work for the corporations, a common occurrence, and that the equipment remained the property of corporations.

Third, the trial court determined that Jacobs had taken money from his loan account with the corporations (money that Jacobs had loaned to the corporations). However, it was shown that the corporations owed Jacobs this money

and that Jacobs' loan balance always exceeded plaintiff's loan balance.

Fourth, the trial court determined that Jacobs invested in a sewing contractor, Kimmex, in Mexico. At the damage phase of trial, it was shown that plaintiff did not want the corporations to invest in this Mexico operation, the corporations did not do their own sewing, the corporations did not own any other sewing contractors, the corporations' bank had approved the transaction, and the corporations saw benefits from the Mexico operations.

Based on its findings, the trial court determined that Jacobs would be required to purchase plaintiff's stock in the corporations. However, the trial court specifically informed the parties that it had already ruled that plaintiff was not entitled to any damages resulting from his termination from employment including his salary and employee benefits. The trial court directed plaintiff to present evidence at a damage hearing as to (1) when plaintiff was frozen-out of the two corporations, (2) what the value of the stock was at the time he was frozen from these two corporations and (3) how plaintiff was injured due to the conduct of Jacobs that the trial court had previously identified in its adjudication as being "outrageous." *Viener*, 51 Pa. D. & C. 4th at 297-98.

At the damage phase of the case, in examining the equitable remedy of requiring the repurchase by Jacobs of plaintiff's stock, the trial court determined that the proper value of the stock held by plaintiff was $1.2 million. Using this equitable award as a baseline, the trial court then awarded plaintiff $1 million in punitive damages. Although the trial court had previously identified four purported outrageous acts committed by Jacobs, plaintiff never proved at the damage phase of the trial that he was damaged personally by these acts. Because of the lack of evidence that plaintiff was personally damaged, the trial

court made no specific findings that any damage was caused to plaintiff by these acts to allow the award of punitive damages to plaintiff. Viener v. Jacobs, 52 Pa. D. & C. 4th 353 (Berks Co. 2001).

Appeal to Pennsylvania Superior Court

On appeal, the Pennsylvania Superior Court held that the equitable award of the value of plaintiff's stock and the award of punitive damages was appropriate. The Superior Court remanded the case to the trial court, however, because it recognized that plaintiff had failed to offer sufficient evidence to prove the value of the stock. The Superior Court instructed the trial court to open the record to allow plaintiff to present additional evidence for plaintiff to meet his burden of proving the value of the stock he held in the corporations. Viener v. Jacobs, 2003 Pa. Super. 324, 834 A.2d 546 (2003).

Petition For Allowance of Appeal To Pennsylvania Supreme Court

Jacobs filed a petition for allowance of appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied the petition without opinion. Viener v. Jacobs, 2004 Pa. LEXIS 1859 (2004).

Pleadings By Plaintiff

In his Amended Complaint, plaintiff claimed that Jacobs and the other shareholders breached their fiduciary duty to plaintiff. As relief in this Count, plaintiff sought an appointment of a receiver [Amended Complaint ¶41; R.50] or, in the alternative, a requirement that the other shareholders purchase plaintiff's interest in the corporations. [Amended Complaint, ¶42; R.50]. In Counts II, III, IV and V, plaintiff claimed: wrongful discharge, derivative shareholder (allegations on behalf of the corporations) and conspiracy. The trial court ruled that

plaintiff was not entitled to any relief on these other Counts including not being able to recover for wrongful discharge.

Unproven Claims

In his Amended Complaint, plaintiff had claimed that $1.2 million worth of sewing equipment was improperly purchased, was unaccounted for, was converted to the possession of others and was not benefiting the corporations. After thorough examination by the corporations' accountants, the equipment purchases were accounted for and their location was documented. Interestingly, they showed that 90% of the checks for the equipment were signed for by plaintiff and the equipment was either in the possession of the corporations or its sewing subcontractors. [Viener; R.329-334; R.756, R.758; R.1110, R.1115][1]. The trial court rejected plaintiff's claim that anyone had stolen this equipment.

In the Amended Complaint, plaintiff also claimed that he was entitled to life-time employment and was entitled to remain in the position of president of the corporations for his lifetime. [Amended Complaint, Count II]. In fact, the dispute between the parties escalated when plaintiff presented the other shareholders with a letter from his law firm, stated that he was entitled to life-time employment and that they lacked the legal authority to replace plaintiff as president. [Viener, R.183]. The trial court determined that such a legal position was erroneous as the shareholder agreement did not guaranty plaintiff's life-time employment or guaranty him a position as president of the corporations.

Even though plaintiff sued claiming that he could not be removed as president, he finally admitted at trial that he could be removed. [Viener, R.375]. After finally

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[1] To provide the statement of facts, we have relied almost exclusively on the testimony of Viener himself. The reference to R.1 is to the record produced for the Pennsylvania appellate courts.

conceding at trial that he had no life-time contract with the corporations, plaintiff also conceded that neither Rush or Jacobs ever orally promised him life-time employment. [Viener, R.260 (Q: "Did Mr. Rush or Mr. Jacobs ever orally promise you that you would have employment with the corporations for life? A: No.")].

Plaintiff's Inadequacies as President

Plaintiff admitted that while he was still president of the corporations it became apparent that there was a serious inventory problem with the corporations The problem surfaced when the books were reorganized to include garment calculations in the corporations' calculations of inventory. When sales increased, the inventory problem was even further aggravated. Plaintiff, as president, was responsible for inventory control.

Notwithstanding the fact that the corporations had spent a half million dollars to install a perpetual inventory system, as recommended by their accountants, plaintiff failed to put the system in place as president, notwithstanding the fact that it fell within the realm of his duties. [Viener, R.311-313].

During his presidency, the corporations' margins also began declining. [Viener, R.372]. At the same time, the corporations were in an overadvanced position with the Bank of New York in its factoring arrangement. [Viener, R.648]. Likewise, plaintiff admitted that while he was still president, the corporations suffered significant losses. Losses were primarily due to adjustments to inventory shortages which were under plaintiff's control. [Viener, R.258].

Rush, Not Jacobs, Wanted Plaintiff Out - Plaintiff Removed as President

At a board of directors' meeting, following corporate formalities, plaintiff was removed as president and Joffred,

the corporations' outside accountant, was installed in that position. However, Jacobs voted with plaintiff, for plaintiff to be retained as vice president and to continue at his same salary as when he was president. Rush voted against retaining plaintiff and wanted him fired immediately. [Exhibit 1, R.1013].

Although Jacobs remains the only defendant, plaintiff conceded that it was Rush who wanted to "get rid of me as president, he said at that time if it were up to him, he would take my salary and give it to Joffred, but Jacobs wouldn't agree to that." [Viener, R.297].

Following this meeting, rather than work with his other shareholders in devising a plan on how to clean up the administrative areas of the corporations, plaintiff directed his lawyers to draft a complaint and file suit for his removal as president.

Plaintiff's Unproductive Activities After Removal as President

At a board meeting, Jacobs informed plaintiff that if he did not cross-guarantee the corporations' debt, Jacobs would take his money out of the loan account, which represented money that corporations owed Jacobs. [Exhibit 19, R.1141]. Plaintiff still refused to cross-guarantee the debts but Jacobs stood by the corporations and allowed his money to remain.

Plaintiff contacted the corporations' lenders and had himself released as a personal guaranty on the corporations' debt. He did this on his own without agreement of the other shareholder. [Viener, R.648].

Plaintiff's Self-Withdrawal from Corporations

Plaintiff as vice president was to prepare a fixed assets list. Instead of preparing it, plaintiff accused the other shareholders of stealing $1.2 million of fixed assets. After

the lengthy audit by an outside firm, it was confirmed that plaintiff's allegation was unfounded.

After his fellow shareholders accused plaintiff of not working, Joffred suggested that plaintiff keep a time log which initially plaintiff agreed to do. However, the following day, plaintiff threw the documents at Joffred and refused to do it because he was trying to build a lawsuit against his fellow shareholders.

Joffred testified that it was lucky if plaintiff was at the location for even 20 hours a week even though his job entailed being on location administering the business. On the other hand, Jacobs was a workaholic who worked seven days a week. [Joffred, R.502-503].

Threatens to Sue and Rejects Proposal Which Followed Agreed Approach Under Shareholder Agreement

After being discharged from employment, Rush and Jacobs offered to buy plaintiff's shares in the corporations at book value over five years. The offer was based on the formula established in the Shareholders' Agreement. Plaintiff refused. [Exhibit 1, R.981].

After plaintiff refused to sell his shares as contemplated by the Agreement, Jacobs, Rush and Friedman agreed to sell their shares to plaintiff based on the same terms and conditions. However, plaintiff refused to then go forward with the transaction. [Exhibit 21, R.1155]. Plaintiff refused to sign the Agreement because he wanted to continue to sue Rush and Jacobs for removing him as president. [Viener, R.645]. A legal position the trial court eventually found was baseless.

Prior to his discharge as an employee, plaintiff had personally guaranteed financing for the corporations. Plaintiff withdrew these guarantees when he was removed as president. [Exhibit 1, R.989].

Subsequent to his termination, plaintiff refused to personally guarantee any of the loans or credit facilities that the corporations had entered into with financial institutions although all other shareholders have previously been required to do so. [Exhibit 1, R.1032].

Efforts to Save Corporations

During the time period after plaintiff left and withdrew his personal guaranties, Jacobs began guaranteeing significantly more of the corporations' debt so as to allow the corporations to continue to operate. [Joffred, R.494].

The corporations were required to borrow an additional $750,000. Rather than liquidate the corporations, Jacobs personally guaranteed the $750,000 debt and pledged his own assets. Eventually Jacobs lost this money to the corporations' creditors. [Joffred, R.495].

At the time the business was being shut down, The Bank of New York was owed in excess of $3 million. However, Jacobs was able to have the debt paid down to approximately $300,000. [Jacobs, R.905].

Reasons for Failure

In early 1996, Rush, one of the other shareholders, lost JC Penney as a major customer of the corporations because there was a change in buyers at JC Penney. This change substantially impacted the corporations' business. This account had represented between $12 million and $14 million of the corporations' sales, which was over one-third of their sales. This was business that had been previously obtained by Rush.

Another major problem in 1996 was that Friedman, one of the other shareholders, purchased yarn based on a very large order that he was expecting from Target. However, after further review, it was revealed that Target had given the corporations sales projections but no guarantee that it would ultimately make these purchases.

Eventfully, the corporations were forced to sell off a major portion of its produced garments at reduced prices, which caused losses in excess of $1 million. [Joffred, R.452-453].

Because of Friedman's build up of yarn on the Target order that never materialized and Rush's loss of the JC Penney account, the corporations had to enter into additional financing. Based upon plaintiff's prior efforts to unilaterally remove his personal guaranty from the financing of the corporations, the corporations only received personal guaranties from Jacobs, Rush and Friedman. [Joffred, R.495-497.]

In late 1996, the corporations suffered losses because Target did not purchase the $6 million worth of garments that Friedman had believed it would purchase. This error by Friedman caused the corporations to go into over-advanced position with its factor. [Joffred, R452-453].

In fact, plaintiff conceded in his testimony that the losses were caused by unrealistic projections (not prepared by Jacobs) and excess inventory (which was not ordered by Jacobs) and were not caused by Jacobs. [Viener, **154a**].

As explained above, plaintiff offered no evidence that Jacobs' purported outrageous conduct caused damages to him personally.

REASONS FOR GRANTING THE PETITION

I. PERMITTING PLAINTIFF TO RECOVER PUNITIVE DAMAGES VIOLATED DEFENDANT'S DUE PROCESS RIGHTS BECAUSE NO ACTUAL COMPENSATORY DAMAGES WERE FOUND TO HAVE BEEN CAUSED TO PLAINTIFF DIRECTLY.

The Pennsylvania Superior Court failed to consider the impact of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (Kennedy, J.), on this case. *Campbell* dramatically and fundamentally changed the law of punitive damages governing state and federal courts nationwide. Jacobs respectfully submits that *Campbell* is binding on the Pennsylvania Superior Court, as it requires compliance with the United States Constitution and itself reviewed a state court award of punitive damages.

In several specific regards, discussed *infra*, *Campbell* dictates a conclusion that the trial court's award of punitive damages in this case violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and should be vacated entirely. First, the trial court made no determination of actual damages being caused to plaintiff directly. Instead, the trial court made an award to plaintiff by ordering Jacobs to pay plaintiff the value of plaintiff's stock in the corporations.

Second, although the trial court identified certain conduct of Jacob's that it considered outrageous, it never found that conduct damaged plaintiff directly as opposed to possibly causing some alleged damages to the corporations. In fact, the trial court never even made a finding as to the amount of compensatory damages the outrageous acts were supposed to have caused plaintiff or the corporations. At the very least, the Superior Court should have directed the trial court to require plaintiff to prove any actual damages

caused to plaintiff personally by these purported outrageous acts.

To be sure, the case at bar is straightforward. As is evident from the undisputed facts of record, plaintiff never proved that he was personally damaged by the purported outrageous acts. Under *Campbell*, Jacobs respectfully submits, this Court must not allow that unconstitutional award to stand.[2]

In *Campbell*, this Court reversed a state Supreme Court's affirming of a punitive damage award, based on principles outlined in *BMW of North America v. Gore*, 517 U.S. 559 (1996) (Stevens, J.). *Campbell*, at 419. As discussed above, in *Gore*, the Supreme Court identified three guideposts to aid courts reviewing the constitutionality of punitive damage awards:

> (1) the degree of reprehensibility of the defendant's misconduct;
>
> (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
>
> (3) the difference between the punitive damages awarded by the jury and the

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[2] *Campbell* is forcing courts nationwide to revisit awards of punitive damages. *See, e.g.*, Robert S. Greenberger, *Justices Order Ford Case Revisited*, WALL ST. J., May 20, 2003, at A6 ("The Supreme Court, in an important action underscoring its distaste for hefty punitive damage awards, ordered lower courts to reconsider two multimillion-dollar judgments against Ford Motor Co."). *See Ford Motor Co. v. Estate of Tommy Smith*, 538 U.S. 1028 (2003) (vacating judgment and remanding to the Supreme Court of Kentucky for "further consideration in light of" *Campbell*); *Ford Motor Co. v. Romo*, 538 U.S. 1028 (2003) (vacating judgment and remanding to the Court of Appeal of California, Fifth Appellate District, for "further consideration in light of" *Campbell*).

> civil penalties authorized or imposed in comparable cases.

Gore, 517 U.S. at 575. Justice Stevens explained:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.

Id. at 574.

Campbell establishes that the trial court erred as a matter of law when it awarded any punitive damages, for two reasons. First, as *Campbell* makes clear, because the record does not contain sufficient evidence to satisfy the first *Gore* guidepost – reprehensibility of the defendant's conduct – the punitive damages award is "suspect," as set forth below. Jacobs' conduct involved the management of closely held corporations and did not involve loss of life or risk of personal injury. Second, *Campbell* strongly supports Jacob's argument that the trial court erred in awarding punitive damages because it based that award on an equity decree not on proof of actual damages being caused to plaintiff personally. Thus, there is more than just a disparity between the actual harm and the punitive damage award. In fact, no actual damages were awarded. Instead, the trial court simply made an equity determination concerning the purchase of plaintiff's stock.

Accordingly, for either of these reasons, the trial court should have been instructed to enter a directed verdict for Jacobs on punitive damages.

In *Campbell*, Justice Kennedy reiterated *Gore's* list of factors that courts should use to determine whether the facts of record are sufficient to satisfy the first *Gore* guidepost, the degree of reprehensibility of the defendant's

conduct. Reprehensibility is the "most important indicium of the reasonableness of a punitive damages award." *See Campbell*, at 419 (*quoting Gore*, 517 U.S. at 575). The *Gore* reprehensibility factors are:

(1) Whether the harm caused was physical as opposed to economic;

(2) Whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;

(3) Whether the target of the conduct had financial vulnerability;

(4) Whether the conduct involved repeated actions or was an isolated incident; and

(5) Whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, at 419 (citing *Gore*, 517 U.S. at 576-77). The *Campbell* Court specifically noted: "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages...." *Campbell*, at 420 (emphasis added).

As set forth below, the application of these principles to the instant case shows that the evidence of record does not satisfy the *Gore* guideposts and, therefore, no award of punitive damages is appropriate.

(a) Nature of the Harm

This factor weighs in favor of Jacobs, as it is undisputed that the only harm allegedly suffered was economic. There is no physical harm. Moreover, the

economic harm, if any, was caused to the corporations and not to plaintiff individually.

(b) Indifference To Or Reckless Disregard Of the Health or Safety of Others

This factor, also, weighs in favor of Jacobs, insofar as Jacobs' conduct did not evince any "indifference to or a reckless disregard of the health or safety" of the plaintiff or any one else. At no time was there any risk at all to the health or safety of plaintiff.

(c) Financial Vulnerability of Plaintiff

This factor also weighs in favor of Jacobs, as there is no evidence in the record of any financial vulnerability of plaintiff. In fact, the opposite is true. Plaintiff refused to guarantee any of the debt of the corporations while Jacobs guaranteed virtually all of the corporate debts and Jacobs personally lost well in excess of two million dollars when the corporations failed.

(d) Whether the Conduct Involved Repeated Actions Or Was An Isolated Incident

This factor weighs in favor of Jacobs as well. There is no evidence in the record that Jacobs' conduct involved repeated actions or a widespread practice. To the contrary, the evidence in the record shows only conduct related to a dispute over the management of two closely held corporations, i.e., an isolated incident.

(e) Whether the Harm Was the Result of Intentional Malice, Trickery, or Deceit, or Mere Accident

There is no proof in the record of any intentional malice, trickery, or deceit. In fact, plaintiff was fully aware of Jacobs' activities. At the end of the day, at worst, what Jacobs did was grossly negligent, and there is simply no proof in the record of any intentional malice. None of

Jacobs' conduct was hidden from plaintiff. Accordingly, this factor weighs in favor of Jacobs.

As the Supreme Court held in both *Campbell* and *Gore*, reprehensibility is the "most important indicium of the reasonableness of a punitive damages award." *See Campbell*, at 420 (*quoting Gore*, 517 U.S. at 575). In *Campbell*, the Supreme Court stated unequivocally: "The existence of any one of these [reprehensibility] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and **the absence of all of them renders any award suspect**." *Campbell*, at 420 (emphasis added). Here, the absence of any of the *Gore* reprehensibility factors weighing in favor of plaintiff dictates a finding of no reprehensibility, and makes the trial court's award of punitive damages inherently "suspect" under *Campbell*. *See Campbell*, at 420.

In this case, the trial court erroneously magnified the purported reprehensibility of Jacobs' conduct by considering the value of plaintiff's stock when considering punitive damages. Instead, the trial court was limited to focusing on the conduct pursuant to which it found that Jacobs had acted outrageously. In other words, the trial court's legal error concerning the scope of liability unconstitutionality inflated the punitive damages award, making that award unreasonable as a matter of law.

Similarly, because no actual damages were found by the trial court, there is **no** ratio of the punitive damages to the actual damages which indicates the award of punitive damages would be appropriate. Plaintiff was not personally harmed by the portion of Jacobs' conduct that the trial court found was outrageous. Such harm, if any, was harm caused to the corporations and not plaintiff individually.

Punitive Damages are Not Available in Equity

In interpreting common law, federal courts have consistently held that punitive damages are not available in equity. *See Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386, 396 (5th Cir. 1982) (stating that "fiduciary duties are creatures of equity . . . and . . . punitive damages are not recoverable in a court of equity"). Likewise, in evaluating federal legislation that allows for the recovery of "appropriate equitable relief," federal courts have also held that punitive damages are not recoverable as "other appropriate equitable relief" under ERISA. *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir. 1989); *Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 888 n.2 (10th Cir. 1988); *Bishop v. Osborn Transp., Inc.*, 838 F.2d 1173, 1173-74 (11th Cir. 1988); *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987). *In Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), this Court addressed the question of whether ERISA authorizes extra-contractual damages for a breach of a fiduciary duty by a nonfiduciary for a claim brought under 29 U.S.C. 1132 (a)(3). The Court held that even though equity permitted recovery of money relief for a breach of a fiduciary duty, the law did not authorize suits for the recovery of punitive damages when the statute permitted the "appropriate equitable relief." *Id.* at 259.

Simply put, punitive damages have traditionally not been recoverable in actions brought derivatively in equity for at least three sound reasons. These include that the court lacks the power to make such an award in the absence of an express grant, that an award of punitive damages is incompatible with the principles of equity, and that such damages are waived because the plaintiff brought the action on behalf of a corporation. *Robertson v. White*, 633 F. Supp 954, 965 (W.D. Ark. 1986)(as vehicles of equity, punitive damages are not available).

Here, plaintiff brought his action as a derivative action in equity and sought equitable relief, i.e., the repurchase of his stock in two corporations. The trial court granted him that extraordinary relief but then also awarded to him personally punitive damages rather than awarding such relief to the corporations. As this Court recognized in *Mertens*, punitive damages are not recoverable in equity.

The trial court should have been instructed to enter a directed verdict to defendant on punitive damages. In the alternative, the trial court should have been directed to award punitive damages only to the extent that Jacobs' conduct caused actual damages to plaintiff individually.

II. IF IT IS DETERMINED BY AN APPELLATE COURT THAT A PLAINTIFF FAILED TO PROVE AN ESSENTIAL ELEMENT OF HIS CASE, A DEFENDANT'S DUE PROCESS RIGHTS ARE VIOLATED IF THE APPELLATE COURT REMANDS THE CASE TO ALLOW PLAINTIFF TO SUPPLEMENT THE TRIAL COURT RECORD.

As Justice Cardozo stated "due process of law requires that the proceedings shall be fair." *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934). This Court has examined on a number of occasions what due process must be afforded to civil defendants. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (taking into account risk of "erroneous" deprivation in fashioning due process test); *North Georgia Finishing Inc. v. Di Chem Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972). "The constitutional protection of procedural due process seeks to assure that the representative democratic process functions in the manner intended, by preventing the governing substantive law, enacted through that process, from being modified furtively and indirectly through the use of procedures that

skew that law." Redish, Martin H., *Procedural Due Process and Aggregation Devices in Mass Tort Litigation, 63* Defense Counsel Journal 18 (1996).

As the United States Supreme Court has explained:

> At its core, the right to due process reflects a fundamental value in our American constitutional system. . .
>
> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."
>
> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the **common law model**. . . .

Boddie v. Connecticut, 401 U.S. 371, 374-75, 91 S. Ct. 780, 784 (1971).(emphasis added); *Whiteley v Warden,*

Wyoming State Penitentiary 401 US 560 (1971)(denying state's right to reopen the record when any potential for lack of evidence in the record was not because of error by lower court).

Here, the Pennsylvania Superior Court held that plaintiff failed to present sufficient evidence for plaintiff's expert to offer an opinion on damages. Superior Court Opinion ¶ 34 (attached as Appendix C). Based on plaintiff's failure to prove each element of his case, the Superior Court should have reversed the decision of the trial court, vacated the verdict for the plaintiff and entered judgment for Jacobs. Instead, the Superior Court remanded the matter to the trial court to allow plaintiff to present additional evidence. The Superior Court's opinion is a denial of defendant's due process rights as plaintiff already had his opportunity to present his case.

The Superior Court held that there was insufficient evidence of record for the plaintiff's expert to offer his opinion on the Superior Court Opinion ¶ 34. Because it was the burden of the plaintiff to prove damages and to lay a proper foundation for expert testimony, the Superior Court should have reversed the decision of the trial court, vacated the verdict for the plaintiff and entered judgment for Jacobs. Instead, the Superior Court remanded the matter to the trial court to allow the plaintiff a second opportunity to prove an essential element of his case. The Superior Court did not cite to any authority to support the proposition that a plaintiff can have the record reopened at the trial level to offer additional evidence to correct a fatal error in the plaintiff's evidence.

Even under Pennsylvania law, when a plaintiff fails to establish damages, the defendant is entitled to a verdict in his favor. *Sisk v. Duffy*, 201 Pa. Super. 213, 192 A.2d 251 (1963). Recently, the Pennsylvania Superior Court, after holding that the defendant was properly found liable,

reversed a judgment against the defendant because the plaintiff failed to prove damages. *Price v. Chevrolet Motor Div. of GMC*, 2000 Pa. Super. 410, ¶ 21, 765 A.2d 800, 812 (2000). The *Price* Court did not remand to allow the plaintiff to fix her evidentiary failure of not presenting sufficient evidence of damages. *Id.* Instead, the Superior Court entered judgment against the plaintiff and gave the plaintiff no opportunity to introduce new evidence at the trial level. In the case at bar, the Superior Court, in an unprecedented move that denies Jacobs the basic fundamental due process rights, remanded the case to allow plaintiff to reopen the record for the sole purpose of correcting the plaintiff's own failure to present sufficient evidence.

In *Judy Ellyn, Inc. v. Hyde Park Fashions, Inc.*, 206 Pa. Super. 569, 573, 214 A.2d 296, 298 (1965), the Superior Court affirmed the striking of testimony of plaintiff's expert and the entry of a compulsory nonsuit for the defendant. Defendant had admitted that it had damaged plaintiff's finished garments and the only issue to be resolved at trial was the extent of these damages. The Pennsylvania Supreme Court agreed that the trial court had properly excluded the expert's testimony based on his unfamiliarity with the garments that were to be valued. The Superior Court further reasoned that "an expert witness is not competent to testify as to value unless his opinion is based on a familiarity with the object in question." Because the expert lacked knowledge of the "quality and character" of the garments, his testimony should have been excluded. 206 Pa. Super. at 574, 214 A.2d at 299. Here, plaintiff's expert was not realistic, did not base his opinion on legitimate assumptions, and therefore, his testimony should not have been considered. Without this testimony, plaintiff did not prove an essential element of his case, and

the Superior Court should have entered judgment for Jacobs.

Plaintiff's expert purportedly valued the corporations. However, he admitted that he used the tax returns for only one of the corporations from 1990 through 1994 to value both of the corporations. He never saw the RGC tax returns. [Wilusz, R.821]. (RGC'S 1994 tax return was never admitted into evidence as it was withdrawn from consideration by plaintiff's counsel. [Viener's counsel, R.980]). The expert conceded that his analysis was limited because he failed to obtain management information which he commonly does in doing an analysis. [Wilusz, R.821]. However, the expert admitted that he never attended any depositions, never reviewed any deposition transcripts, never attended trial, never reviewed the trial transcripts and never requested that plaintiff's counsel ask any specific questions during discovery so as to provide him with a foundation for his opinion. [*Id.*]

The expert on cross examination admitted his total misunderstanding and lack of knowledge of the corporations. [Wilusz, R.831]. For example, he believed that the two corporations had filed one tax return over the period of time of 1990 through 1994; the time period he evaluated and for which he was offering an opinion. [Wilusz, R.831]. He believed there were three shareholders in RGC, just like there were three shareholders in NGN, which, of course, is incorrect because there are four equal shareholders in RGC. [Wilusz, R.831]. He therefore valued plaintiff's one-third interest in both companies, even though plaintiff only owned one-fourth of RGC. [Wilusz, R.831].

He admitted his total misunderstanding of the fact that the corporations were two separate corporations. For example, he was asked: "Did you ever inquire of anyone as to two corporations filing one return?" Answer: "No. I

inquired of Mr. Viener if that was the case and he said it was." Question: "He said that only one tax return was filed?" Answer: "Yes." [Wilusz, R.833]. The expert conceded that he never knew that RGC filed separate tax returns. [Wilusz, R.836].

Upon questioning of the trial court, Wilusz admitted that he was unaware of the percentage of income and expenses related to RGC compared to NGN for 1994. He further admitted under the trial court's questioning that he was unaware of the fact that there were four shareholders in RGC and three shareholders in the corporations. [Wilusz, R.840]

Because plaintiff failed to provide a factual foundation for his expert's testimony, the trial court should have directed a verdict for Jacobs. Without the factual foundation and without this testimony, the trial court had no basis to award any damages. To allow plaintiff to reopen his case after he had a full opportunity to present his case is a denial of Jacobs' basic due process rights.

CONCLUSION

The Court should grant this petition for certiorari.

Dated: November 12, 2004

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APPENDIX A

VIENER V. JACOBS

No. 563-95

COMMON PLEAS COURT OF
BERKS COUNTY,
PENNSYLVANIA

51 Pa. D. & C.4th 260; 2000
Pa. D. & C. LEXIS 276

June 30, 2000, Decided

COUNSEL: [**1] Rees Griffiths and David M. Kozloff, for plaintiff.

Thomas C. Zielinski, for defendants.

JUDGES: SCHAEFFER, S.J.

OPINION BY: SCHAEFFER

OPINION:

[*261] I. INTRODUCTION

George P. Viener brought this suit against Neal Jacobs, Norman Rush, Michael A. Joffred, Allen Friedman, [*262] N.G.N. Inc., Reading Garment Company Inc., Ellmar Manufacturing Inc., Nagan Leasing Inc., Energy Knits, Inc., Reading Dyeing and Finishing Inc., Little Creek Mills Inc., LCMA Inc., Amity Finishing Inc. and G.N.K Partnership.

Norman Rush, NGN, RGC, Ellmar, LCMA and Reading Dyeing have all been adjudicated bankrupt and all proceedings in this action are stayed as to them.

No evidence was presented at the non-jury trial which would make Nagan, Energy, Reading Dyeing, Little Creek, Amity or G.N.K. liable to Viener and, therefore, Nagan, Energy, Reading Dyeing, Little Creek, Amity and G.N.K. are dismissed as parties defendant.

Likewise, no evidence was presented at the non-jury trial which would make Joffred liable to plaintiff and therefore, Joffred is dismissed as a defendant. The parties have agreed that Friedman had no involvement in the decision made by NGN's Board of Directors to remove Viener as president [**2] or to terminate his employment, and plaintiff does not allege in his amended complaint that Friedman is one of the majority shareholders of NGN that breached his fiduciary duty to Viener. Furthermore, plaintiff is no longer seeking relief from this defendant. Therefore, Friedman is dismissed as a party.

That leaves Viener's claims against Jacobs to be resolved.

With the agreement of the parties, we bifurcated the trial, hearing evidence on liability only.

Viener claims Jacobs is liable to him for the following reasons:

[*263] "(1) for permitting NGN to remove him as its president and therefore as one of its corporate officers;

"(2) for permitting RGC to remove him as an officer;

"(3) for terminating his employment with RGC and NGN;

"(4) for freezing him out as a minority stockholder of NGN and RGC and preventing him from exercising a position with the corporations."

Plaintiff also claims Jacobs is liable to him for punitive damages because he, Jacobs,[3] as a majority shareholder in RGC and NGN, was guilty of outrageous conduct toward him, Viener, in the manner in which Jacobs treated Viener, a minority stockholder in each of these corporations.

[**3]

Viener seeks compensation for the salary he lost from the date of his termination with NGN and RGC and to compel Jacobs to purchase his stock in NGN and RGC for a value that will fairly and adequately compensate Viener for his investment in NGN and RGC as of the end of 1994.

Plaintiff also seeks a constructive trust over Jacobs' shares in LCMA and the remaining non-bankrupt corporation, Energy Knits.

Viener argues as one basis for his right to recover against Jacobs is that Jacobs conspired with Rush, Joffred and Friedman to deprive Viener of his rights as a minority shareholder.

[*264] Plaintiff's claim seeking repayment of the sums advanced by NGN and RGC to defend this suit is a claim which affects the rights and obligations of NGN and RGC and is in the nature of a minority stockholder's derivative suit. Therefore, since NGN and RGC are now in bankruptcy, we cannot proceed to consider or resolve these issues at this time.

II. FINDINGS OF FACT

THE PLAINTIFF IN THIS ACTION IS GEORGE P. VIENER, AN ADULT INDIVIDUAL

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[3] Viener had also asked that a receiver be appointed for NGN and RGC. The court granted his request, a receiver was appointed and then removed, Viener does not now seek a receiver for NGN or RGC; the companies are in bankruptcy.

WHO RESIDES AT 1515 ROCKLAND STREET, READING, PENNSYLVANIA.

THE INDIVIDUAL DEFENDANTS IN THIS ACTION ARE NEAL JACOBS, OF 8 WYNDHAM HILL, READING, PA 19606, [4] NORMAN RUSH, 36 HICKORY, ENGLEWOOD CLIFFS, NJ 07632, MICHAEL JOFFRED, OF 821 CARMAN DRIVE, WYOMISSING, PA 19610, AND ALLEN FRIEDMAN OF 5 MEDLINE AVENUE, MONTICELLO, NY 12701.**

VIENER BROUGHT THIS ACTION IN HIS OWN NAME AND DERIVATIVELY AS A SHAREHOLDER OF NGN INC. AND READING GARMENT COMPANY.

NGN IS A CORPORATION EXISTING UNDER THE LAWS OF PENNSYLVANIA AND, AT THE TIME IT WENT INTO BANKRUPTCY, HAD ITS PRINCIPAL OFFICE AND PLACE OF BUSINESS AT 601 HEISTER LANE, READING, BERKS COUNTY, PENNSYLVANIA 19605.

VIENER, JACOBS AND RUSH EACH OWN RESPECTIVELY 10 SHARES (OR 33 1/3 PERCENT) OF THE ISSUED AND OUTSTANDING STOCK OF NGN.

VIENER, JACOBS, RUSH AND FRIEDMAN OWN RESPECTIVELY 25 PERCENT OF THE ISSUED AND OUTSTANDING STOCK OF RGC.

[*265]

NGN, RGC AND RUSH ARE IN BANKRUPTCY AND THESE PROCEEDINGS ARE STAYED AS TO THESE DEFENDANTS.

GEORGE VIENER AND HIS FATHER REUBEN VIENER HAD BEEN IN THE TEXTILE MANUFACTURING BUSINESS IN THE

READING/ALLENTOWN AREA FOR MORE THAN 50 YEARS. (EXHIBIT 1, P. 18, P24.)

VIENER INITIALLY HIRED JACOBS AS A PLANT MANAGER IN HIS FATHER'S BUSINESS (THE PREDECESSOR TO NGN) IN 1969. ***(ID.)***

AFTER A ONE-YEAR PROBATIONARY PERIOD, [5] JACOBS WAS OFFERED AND ACCEPTED A 20 PERCENT OWNERSHIP IN THE VIENER FAMILY BUSINESS, WHICH WAS GIVEN TO HIM BY TRANSFERRING 5 PERCENT OF THE ISSUED STOCK IN EACH OF FOUR SUCCESSIVE YEARS.** ***(ID.)***

IN 1981, AFTER CLOSING ARKAY KNITTING MILLS, VIENER AND JACOBS BEGAN PRODUCING GARMENTS FOR A COMPANY WHICH EMPLOYED RUSH, WHO HAD BEEN VIENERS' FRATERNITY BROTHER AND FRIEND DURING THEIR COLLEGE YEARS AT THE UNIVERSITY OF PENNSYLVANIA. (EXHIBIT 1, P. 19 P25.)

WHEN VIENER, JACOBS AND RUSH CONSIDERED FORMING THEIR OWN COMPANY, VIENER'S KNOWLEDGE AND EXPERIENCE WITH THE ADMINISTRATIVE ENDS OF THE BUSINESS WERE ESSENTIAL TO SETTING UP THE NEW VENTURE, NGN (THE ACRONYM FOR THE FIRST NAMES OF THE THREE OWNERS), WHICH THEN BEGAN BUSINESS ON JANUARY 1, 1983. (NOTES OF TESTIMONY VIENER, 8/11/97, P. 99.)

AT THE TIME NGN WAS FORMED, VIENER SUPPLIED THE BUILDING ON MCKNIGHT STREET RENT FREE FROM WHICH NGN CONDUCTED ITS OPERATIONS; HIS FAMILY DID

NOT ADD ON ANY PROFIT MARGIN FOR THE BUILDING. (N.T. VIENER, 8/3/99, P. 278; N.T. VIENER, 8/11/97, PP. 100-101, 249-50.)

[*266]

VIENER, RUSH AND JACOBS INCORPORATED THEIR NEW VENTURE TO OBTAIN THE BENEFITS OF LIMITED LIABILITY; [6] THEY ALSO ELECTED SUBCHAPTER S STATUS (EXCEPT FOR ELLMAR), WHICH RESULTED IN CORPORATE INCOME BEING REPORTED AND TAXED TO THEM AS THOUGH THEY WERE PARTNERS. (EXHIBIT 1, P. 20, P32.)**

AFTER INCORPORATING, VIENER, RUSH AND JACOBS CONSTITUTED THE ENTIRE BOARD OF DIRECTORS OF THE NEW ENTITY, NGN; THE BOARD MET AT LEAST FOUR TIMES A YEAR. (*ID.;* N.T. VIENER, 8/7/99, P. 361.)

VIENER WAS SELECTED AS PRESIDENT OF NGN, RUSH AS VICE-PRESIDENT OF SALES AND TREASURER, AND JACOBS AS VICE-PRESIDENT OF MANUFACTURING AND SECRETARY. (EXHIBIT 1, P. 20, P32.)

ALTHOUGH EACH OF JACOBS, RUSH (MAJORITY SHAREHOLDERS) AND VIENER (MINORITY SHAREHOLDER) MADE DIFFERENT CONTRIBUTIONS TO THE START-UP OF THE BUSINESS, THEY AGREED THAT EACH WOULD OWN A THIRD OF THE ISSUED AND OUTSTANDING STOCK OF NGN. (EXHIBIT 1, P. 20, P33.)

MOREOVER, ALTHOUGH THEIR RESPECTIVE POSITIONS, DUTIES AND CONTRIBUTIONS TO THE ONGOING SUCCESS OF NGN WERE IN ALL CASES UNIQUE AND

DIFFERENT FROM THE OTHERS, THESE THREE OWNERS/SHAREHOLDERS EACH RECEIVED COMPENSATION AND BENEFITS EQUAL TO THAT RECEIVED BY THE OTHER AFTER 1984. ***(ID.)***

THE OWNERS EQUALLY RECEIVED ADDITIONAL DISTRIBUTIONS IN EXCESS OF THEIR BASE [7] SALARIES OF $150,000 EACH, LUXURY CARS AS AN ELEMENT OF THEIR COMPENSATION, DISABILITY INSURANCE WHICH PROVIDED FOR $8,000 PER MONTH FOR THE DURATION OF ANY DISABILITY OF A SHAREHOLDER, AND COMPREHENSIVE LIFE INSURANCE. (EXHIBIT 1, PP. 9-12, PP11, 15D, 15E AND 15F; N.T. VIENER, 8/11/97, P. 158.)**

[*267

VIENER AVERAGED BETWEEN $300,000 AND $ 375,000 PER YEAR IN SALARY AND DISTRIBUTIONS FROM NGN; IN SOME YEARS HE GOT UP TO $ 450,000. (N.T. VIENER, 8/11/97, PP. 161, 164.)

SHAREHOLDERS MAINTAINED LOAN ACCOUNTS WITH THE CORPORATION WHICH CONTRIBUTED TO THE CORPORATION'S WORKING CAPITAL AND EARNED INTEREST AT THE RATE OF 12 PERCENT PER ANNUM; THE SHAREHOLDERS TOOK THEIR DISTRIBUTIONS AND THEN LOANED THE MONEY BACK TO NGN AS PART OF ITS CAPITAL ACCOUNT TO GROW THE BUSINESS. (EXHIBIT 1, P. 12, P15G; N.T. VIENER, 8/11/97, P. 166.)

THE CORPORATION AND SHAREHOLDERS DID NOT EXECUTE ANY NOTES OR LOAN AGREEMENTS; THERE WERE NO AGREEMENTS

OR UNDERSTANDINGS AS TO THE TERMS OR TIMING OF PAYMENTS; AND THE SHAREHOLDERS MADE ADVANCES OR WITHDRAWALS ON AN IRREGULAR BASIS. (EXHIBIT 1, P. 13, P15H.)

VIENER, RUSH AND JACOBS ENTERED INTO A SHAREHOLDER AGREEMENT TO PROVIDE FOR [8] CONTINUITY IN THE MANAGEMENT OF THE BUSINESS AND AFFAIRS OF NGN. (EXHIBIT 1, P. 8, P9; EXHIBIT 5.)**

THE SHAREHOLDER AGREEMENT PROVIDED FOR A VOLUNTARY SALE OR BUYOUT OF STOCK AT BOOK VALUE. (EXHIBIT 5, P. 3, P2(C).)

THE SHAREHOLDER AGREEMENT DID NOT CREATE ANY RIGHTS TO EMPLOYMENT OR CONTINUED EMPLOYMENT OF ANY PARTY THERETO BY A CORPORATION OR BY AN INDIVIDUAL OR ENTITY AFFILIATED WITH ANY CORPORATION, AND SPECIFICALLY SAID SO. (EXHIBIT 5, P. 8, P7.)

NONE OF THE SHAREHOLDERS HAD WRITTEN CONTRACTS OF EMPLOYMENT WITH NGN OR RDC. (EXHIBIT 1, P. 45, P90.)

[*268]

VIENER SERVED AS PRESIDENT OF NGN FROM ITS INCEPTION TO AUGUST 4, 1994. DURING VIENER'S TERM AS PRESIDENT, NGN GREW DRAMATICALLY, VERTICALLY INTEGRATING INTO RELATED TEXTILE BUSINESSES AND, THROUGH 1992, WAS CONSISTENTLY AND INCREASINGLY PROFITABLE. (EXHIBIT 1, P. 21, P34.)

AS PRESIDENT OF NGN, VIENER HAD THE FOLLOWING DUTIES: YARN PURCHASING; COSTING GARMENTS; FABRIC DEVELOPMENT; RETAIL SALES; SALES OF CLOSE-OUTS/IRREGULARS; AND SOME RESPONSIBILITY FOR THE COMPANY'S ADMINISTRATIVE DUTIES, INCLUDING ACCOUNTING AND FINANCIAL REPORTING, HUMAN RESOURCES (HIRING AND FIRING), FINANCING, INSURANCE AND [9] LEASES. (EXHIBIT 1, P. 46, P94.)**

AS AN OWNER/INVESTOR AND OFFICER OF NGN AND RGC, VIENER RECEIVED DETAILED INFORMATION REGARDING ITS OPERATIONS AND PERFORMANCE ON A REGULAR BASIS, INCLUDING, INTER ALIA, WEEKLY REPORTS WITH RESPECT TO NGN'S AND RGC'S PRODUCTION, SHIPPING, ACCOUNTS RECEIVABLE AND CASH FLOW; INFORMATION REGARDING THE STATUS OF NGN'S AND RGC'S FINANCING AND RELATIONSHIPS WITH LENDERS UPON REQUEST; PLANNING INFORMATION REGARDING EXPANSION AND ACQUISITION OF NEW FACILITIES; AND BUDGETING INFORMATION. (*ID.*, P. 15, P19.)

IN ADDITION, VIENER HAD ACCESS TO ALL OF NGN'S AND RGC'S FACILITIES AND EMPLOYEES, AND TO NGN'S AND RGC'S AFFILIATES. (*ID.*, P20.)

THE OWNERS/SHAREHOLDERS, FROM THE BEGINNING, CRITIQUED AND COMPLAINED OF EACH OTHERS' WORK PERFORMANCES. (N.T. VIENER, 8/11/97, PP. 197-98.)

NGN'S PROFIT MARGIN BEGAN TO DECLINE: NET SALES AND GROSS MARGINS FOR 1992: $26.9 MILLION, 21 PERCENT; [*269] FOR 1993: $29.3 MILLION, 18 PERCENT; FOR 1994: $33 MILLION, 16 PERCENT. (EXHIBIT 1, P. 23, P37.)

AROUND 1993, WHEN NGN LOST MONEY FOR THE FIRST TIME, RUSH INCREASED HIS COMPLAINTS ABOUT VIENER'S PERFORMANCE; PRESSURE WAS STARTING TO BE EXERTED [10] ON VIENER TO IMPROVE HIS AREAS OF RESPONSIBILITY, *I.E.*, INVENTORY CONTROLS. (*ID.;* N.T. JOFFRED, 8/5/99, P. 389.)**

NGN GREW TREMENDOUSLY AND, PRIOR TO JUNE 1994, VIENER WANTED TO BRING IN PROFESSIONAL MANAGEMENT. (N.T. VIENER, 8/11/97, P. 306.)

BEGINNING IN 1994, VIENER EXPRESSED CONCERNS REGARDING THE MANAGEMENT AND OPERATION OF NGN WHICH CENTERED ON, INTER ALIA, CASH PAYMENTS BEING MADE BY NGN TO KIM VAN VU AND N.V. SPORTSWEAR AND THE ACQUISITION AND LOCATION OF MACHINERY AND EQUIPMENT. (EXHIBIT 1, P. 25, P46.)

N.V. SPORTSWEAR HAD GROWN TO BE ONE OF NGN'S LARGEST SUBCONTRACTORS AND JACOBS KEPT N.V. SPORTSWEAR IN PRODUCTION FULL-TIME; PAYMENTS WERE OFTEN MADE TO VAN VU IN CASH FOR THE CHEAP T-SHIRT LINE, THESE GREW TO $1,200 PER WEEK. (EXHIBIT 1, P. 17, P23 B.)

VIENER ASKED MICHAEL JOFFRED, AUDITOR TO NGN, TO CHECK INTO THE

LEGALITY OF THE CASH PAYMENTS BEING MADE TO N.V. SPORTSWEAR; NGN'S BOARD WAS ADVISED BY ROBERT FIRELY OF BEARD & CO., AT ITS MEETING ON MAY 18, 1994, THAT THE CASH PAYMENTS TO KIM NV, INC. WERE OKAY SINCE HER ENTITY WAS A CORPORATION. (N.T. VIENER, 8/7/99, P. 358; EXHIBIT 18.)

AT THE TIME BEARD & CO. ADVISED THE NGN BOARD THAT [11] CASH PAYMENTS TO SUBCONTRACTORS WERE ACCEPTABLE, VIENER WAS HEAVILY DEPENDENT ON JOFFRED'S ADVICE AND COUNSEL AND RELIED ON IT IN PERMITTING CONTINUED CASH [*270] PAYMENTS TO KIM VAN VU AT JACOBS' REQUEST. (N.T. JOFFRED, 8/5/99, P. 388.)**

AROUND JULY OF 1994, VIENER TOLD RUSH THAT HE WAS THINKING ABOUT BRINGING PROFESSIONAL MANAGEMENT INTO THE COMPANY. (N.T. VIENER, 8/11/97, PP. 308-309.)

RUSH TOLD VIENER THAT HE WAS THINKING OF BRINGING MICHAEL JOFFRED IN AS PRESIDENT OF NGN. *(ID.)*

JOFFRED HAD EXPERIENCE IN THE SYSTEMS AREA INCLUDING INVENTORY, PRODUCTION, DATA PROCESSING, COMPUTER SYSTEMS, INCLUDING BOTH HARDWARE AND SOFTWARE APPLICATIONS. (EXHIBIT 1, P. 49, P104; N.T. RUSH, 8/4/99, PP. 218-22, 370-71.)

ON AUGUST 4, 1994, AT A BOARD OF DIRECTORS' MEETING, RUSH AND JACOBS VOTED TO REMOVE VIENER AS PRESIDENT OF NGN. (EXHIBIT 1, P. 33, P58; EXHIBIT 56).

VIENER WAS THEN ELECTED VICE-PRESIDENT OF NGN. (*ID.*, P60.)

VIENER'S SALARY AFTER HIS DEMOTION REMAINED THE SAME AS WHEN HE WAS PRESIDENT.

VIENER'S DUTIES AFTER HIS DEMOTION WERE TO BE AS HE WAS, FROM TIME TO TIME, ASSIGNED.

NGN'S BY-LAWS PROVIDE THAT ANY OFFICER OR AGENT ELECTED [12] OR APPOINTED BY THE BOARD OF DIRECTORS MAY BE REMOVED BY THE BOARD WHENEVER IN ITS JUDGMENT THE BEST INTERESTS OF THE CORPORATION WILL BE SERVED THEREBY, (EXHIBIT 16, ARTICLE V, P3.)**

JOFFRED ATTENDED THE MEETING ON AUGUST 4, 1994 WHEREBY RUSH TOLD JOFFRED THAT IF JOFFRED BECAME PRESIDENT, JOFFRED COULD FIRE VIENER, JACOBS OR RUSH; VIENER DID NOT OBJECT. (N.T. VIENER, 8/11/97, PP. 205-206.)

[*271]

PRIOR TO AUGUST 4, 1994, RUSH ONLY HAD ONE DISCUSSION WITH JOFFRED TO DETERMINE IF JOFFRED HAD ANY INTEREST IN BECOMING PRESIDENT OF NGN AND JOFFRED WAS NOT INTERVIEWED UNTIL THAT DATE; JOFFRED WAS NEVER TOLD THAT VIENER WOULD BE REMOVED AS PRESIDENT ON AUGUST 4, 1994. (EXHIBIT 1, P. 49, PP105, 107, 106.)

THE DAY AFTER THE INTERVIEW, VIENER TOLD JOFFRED TO ACCEPT THE POSITION OF PRESIDENT OF NGN BECAUSE THERE WAS A

REAL OPPORTUNITY THERE FOR JOFFRED. (N.T. JOFFRED, 8/5/99, PP. 433-34.)

AT A MEETING ON AUGUST 12, 1994, RUSH TOLD VIENER THAT HE CONSIDERED HIM TO BE A BAD BUSINESSMAN AND HE HAD BEEN TRYING TO GET RID OF HIM FOR 12 YEARS. RUSH ALSO TOLD VIENER THAT THE PROFIT MARGINS WERE GETTING LOWER AND NGN NEEDED TO SAVE VIENER'S SALARY. (N.T.VIENER, 8/7/97, P. [13] 128.)**

ON SEPTEMBER 19, 1994, VIENER, THROUGH COUNSEL, FORWARDED A PROPOSED AMENDMENT TO THE SHAREHOLDER AGREEMENT WHICH, AMONG OTHER THINGS, PROVIDED FOR CONTINUED EMPLOYMENT FOR VIENER AT A COMPENSATION EQUAL TO JACOBS AND RUSH.

AT THE BOARD MEETING ON SEPTEMBER 20, 1994, JACOBS TOLD VIENER THAT JACOBS WAS WILLING TO SIGN AN AGREEMENT THAT HIS COMPENSATION WOULD BE THE SAME AS AND NEVER MORE THAN VIENER'S. ON OR ABOUT OCTOBER 6, 1994, RUSH AND JACOBS, THROUGH THEIR COUNSEL, SENT A DRAFT CONTRACT WHICH PROVIDED FOR CONTINUED EMPLOYMENT FOR VIENER AT COMPENSATION EQUAL TO JACOBS. NEITHER AGREEMENT WAS SIGNED. (EXHIBIT 1, P. 39, P66; EXHIBIT 10.)

[*272]

NEITHER RUSH NOR JACOBS EVER ORALLY PROMISED VIENER THAT HE WOULD HAVE EMPLOYMENT WITH NGN FOR LIFE. (N.T. VIENER, 8/11/97, P. 205.)

IN SEPTEMBER 1994, ROBERT FIRELY, NGN CONTROLLER, ADVISED JACOBS THAT THE $1,200 PER WEEK WHICH WAS BEING CREDITED AS BEING PAID ON ACCOUNT FOR N.V. SPORTSWEAR WAS IN FACT FOR GARMENT REPAIRS AND FOR DEBT ON THE MARKER MAKING MACHINE RATHER THAN FOR THE CHEAP T-SHIRT PROGRAM. (EXHIBIT 1, P. 28, P47D.)

WHEN JOFFRED BECAME PRESIDENT IN OCTOBER 1994, HE IMMEDIATELY ADOPTED [14] A POLICY PROHIBITING CASH PAYMENTS TO SUBCONTRACTORS. (N.T. JOFFRED, 8/5/99, P. 585.)**

IN LATE 1994, AT JACOBS' DIRECTION, AND DESPITE NGN'S TERMINATION OF CASH PAYMENTS TO SUBCONTRACTORS, CROWN-GLOBE INC. A SUBCONTRACTOR OF NGN, GENERATED INVOICES OF APPROXIMATELY $53,276.59 FOR "PRICE ADJUSTMENTS" TO NGN, WHICH WERE THEN PAID BY NGN. (N.T. 8/11/97, DEPOSITION OF DOUG WOLFE, PP. 46-52, 55-61.)

THESE INVOICES WERE, IN FACT, NOT FOR PRICE ADJUSTMENTS BETWEEN CROWN-GLOBE AND NGN.

SAID INVOICES WERE NOT APPROPRIATE FOR NGN TO PAY AS THEY WERE NOT FOR ANYTHING NGN HAD RECEIVED FROM CROWN-GLOBE, FROM JACOBS, FROM ONE KIM VAN VU OR FROM ANYONE ELSE.

DOUGLAS WOLFE WAS PRESIDENT OF CROWN-GLOBE AT ALL TIMES MATERIAL TO THESE PROCEEDINGS.

THESE INVOICES TO CROWN-GLOBE WERE DEVICES BY WHICH NGN PAID MONEY TO JACOBS AND THROUGH JACOBS TO ONE KIM VAN VU.

NEITHER JACOBS NOR KIM VAM VU WERE ENTITLED TO RECEIVE THIS MONEY FROM NGN.

[*273]

JACOBS CAUSED NGN TO PAY THE $53,276.59 REPRESENTED BY THESE INVOICES TO CROWN-GLOBE.

CROWN-GLOBE, BY ITS PRESIDENT, DOUGLAS WOLFE, THEN PAID THIS $53,276.59, LESS A FEW DOLLARS, TO JACOBS. (N.T., 8/11/97, DEPOSITION [15] OF DOUG WOLFE, P. 66.)**

JACOBS THEN PAID THIS $53,276.59 TO KIM VAN VU. (*ID.*, P. 65.)

NO INVOICES OR BILLS HAD BEEN PRESENTED TO NGN, CROWN-GLOBE, OR FROM ANYONE JUSTIFYING THIS PAYMENT TO KIM VAN VU. (*ID.*, P. 69.)

NEITHER JACOBS NOR KIM VAN VU WERE ENTITLED TO THIS $53,276.59, OR ANY PART THEREOF.

VIENER, ALTHOUGH HE SIGNED THE CHECKS PAYABLE TO CROWN-GLOBE FOR $53,276.59, DID NOT KNOW THAT THE MONEY PAID CROWN-GLOBE WAS FOR BOGUS INVOICES AND DID NOT KNOW THAT THE MONEY WAS GOING TO JACOBS AND KIM VAN VU.

KIM VAN VU WAS JACOBS' BUSINESS ASSOCIATE IN READING AND LATER IN MEXICO.

BY JANUARY 1995, CROWN-GLOBE HAD SENT INVOICES FOR AN ADDITIONAL $48,135.61 TO NGN. (N.T. JOFFRED, 8/6/99, PP. 584-85.)

THESE ADDITIONAL INVOICES, LIKE THE ORIGINAL $53,276.59, WERE NOT FOR ANYTHING WHICH NGN OWED CROWN-GLOBE, BUT, LIKE THE ORIGINAL INVOICES, WERE DEVICES TO GET CASH FROM NGN TO KIM VAN VU.

NEITHER JACOBS NOR KIM VAN VU WAS ENTITLED TO THE $ 48,135.61 REPRESENTED BY THESE ADDITIONAL INVOICES, OR ANY PART THEREOF.

ALL SAID INVOICES, THE ONES FOR THE ORIGINAL $53,276.59 AS WELL AS THE ADDITIONAL ONES FOR [*274] $48,135.61, [16] WERE PLOYS OR DEVICES TO GET THIS MONEY TO KIM VAN VU, WITHOUT SHOWING SUCH PAYMENTS TO HER, AT A TIME WHEN SHE WAS NOT ENTITLED TO ALL, OR ANY PART OF THIS MONEY.**

JACOBS' CONDUCT IN GETTING CROWN-GLOBE TO SUBMIT THE PHONY INVOICES, IN GETTING NGN TO PAY THE PHONY INVOICES AND IN GETTING CROWN-GLOBE TO PAY THE MONEY OVER TO JACOBS SO HE COULD GET CASH TO KIM VAN VU AND N.V. SPORTSWEAR IS OUTRAGEOUS CONDUCT.

ON JANUARY 25, 1995, THE PLAINTIFF SENT JOFFRED AN E-MAIL QUESTIONING SAID INVOICES FROM CROWN-GLOBE. (EXHIBIT 68.)

JOFFRED CONFIRMED VIENER'S SUSPICIONS AND ACKNOWLEDGED THAT THE BOGUS INVOICES WERE AN INAPPROPRIATE

ATTEMPT BY JACOBS TO GET CASH TO KIM VAN VU AND N.V. SPORTSWEAR. (N.T. JOFFRED, 8/5/99, PP. 584-86.)

JOFFRED, AS PRESIDENT OF NGN, STOPPED NGN FROM PAYING THE INVOICES TOTALING $48,135.61 AND THEY WERE NEVER PAID.

N.V. SPORTSWEAR WAS AN ENTITY IN WHICH KIM VAN VU HAD A FINANCIAL INTEREST.

JOFFRED BEGAN TO CONSIDER FIRING VIENER ON OR BEFORE DECEMBER 4, 1994. ON JANUARY 27, 1995, VIENER WAS ADVISED, IN A LETTER FROM JACOBS' AND RUSHS' COUNSEL, THAT THE BOARD HAD DETERMINED TO TERMINATE HIS EMPLOYMENT. (EXHIBIT 1, P. 40, PP72, 74; [17] EXHIBIT 66.)**

ON FEBRUARY 3, 1995, UPON RECOMMENDATION OF CHAIRMAN RUSH AND JOFFRED, THE BOARD OF DIRECTORS OF NGN, BY A TWO TO ONE MARGIN, VOTED TO TERMINATE THE EMPLOYMENT OF VIENER. (*ID.*, PP74, 133; EXHIBIT 20).

AFTER THE BOARD TERMINATED VIENER'S EMPLOYMENT, VIENER REMAINED A DIRECTOR OF NGN.

[*275]

CONTEMPORANEOUSLY WITH VIENER'S DISCHARGE, RUSH AND JACOBS OFFERED TO PURCHASE VIENER'S STOCK IN NGN AND RGC AT ITS BOOK VALUE PAYABLE OVER FIVE YEARS OR ALTERNATIVELY TO SELL THEIR STOCK IN NGN AND RGC AT ITS BOOK VALUE PAYABLE OVER FIVE YEARS; NEITHER BUYOUT

TOOK PLACE. (EXHIBIT 1, P. 41, P76; N.T. VIENER, 8/7/97, P. 387.)

IN 1995, SHORTLY AFTER VIENER'S TERMINATION, NGN CEASED ITS PRACTICE OF HAVING REGULAR QUARTERLY BOARD MEETINGS. (N.T. VIENER, 11/6/98, P. 133.)

THE LOCKS ON THE DOORS AT NGN AND ELLMAR WERE CHANGED SO VIENER NO LONGER HAD PHYSICAL ACCESS TO THE FACILITIES; JACOBS HAD A SET OF KEYS, BUT VIENER DID NOT. (*ID.;* N.T. JACOBS, 8/3/99, P. 116.)

A MEMO WAS SENT TO ALL EMPLOYEES THAT IF THEY SPOKE TO VIENER, THEY WOULD BE FIRED. (N.T. VIENER, 11/6/98, P. 133.)

VIENER WAS EXCLUDED FROM COMPENSATION DECISIONS BY SETTING [18] UP AN OFFICER AND EMPLOYEE COMPENSATION COMMITTEE CONSISTING OF ALL THE OTHER SHAREHOLDERS AND DIRECTORS AND JOFFRED (EXHIBIT 1, P. 34, P61D.)**

VIENER WAS EXCLUDED FROM MEETINGS WITH LENDERS AND FACTORS AND HE WAS NOT PROVIDED WITH DETAILED FINANCIAL INFORMATION REGARDING THE BUSINESS' PROGRESS, EXCEPT FOR QUARTERLY AND ANNUAL FINANCIAL STATEMENTS; HE WAS UNABLE TO OBTAIN INFORMATION ABOUT WHAT WAS GOING ON IN THE COMPANIES EXCEPT THROUGH THE PROCESS OF DISCOVERY IN THIS LITIGATION. (*ID.*, P61 I; N.T. VIENER, 8/11/97, P. 139.)

AMONG THE REASONS FOR WHICH THE BOARD FIRED VIENER WAS THE FACT THAT VIENER ASKED QUESTIONS. (N.T. [*276] 8/11/97, PP. 134-35, DEPOSITION OF STEVE ADAMS, 3/11/96.)

ALTHOUGH NGN AND RGC EXPERIENCED THEIR BEST TWO QUARTERS OF SALES DURING THE FIRST HALF OF 1995, SALES FELL OFF DURING THE SECOND HALF OF 1995. (EXHIBIT 1, P. 23, P38.)

DURING 1995, NGN AND RGC SUSTAINED LOSSES OF $900,000. DURING 1996, NGN AND RGC SUSTAINED LOSSES OF $2.33 MILLION. (EXHIBIT 1, P. 39, P69.)

NO ACTION WAS TAKEN AGAINST RUSH OR JACOBS BECAUSE OF THEIR DEFICIENT PERFORMANCES BECAUSE BRINGING ANY MORE LAWSUITS ON THE COMPANY WOULD HAVE BEEN A DISASTER. [19] (N.T. JOFFRED, 8/5/99, PP. 522-32.)**

IN LATE 1995, JACOBS WAS ATTEMPTING TO ACQUIRE AN INTEREST IN AMEX, A FACILITY IN MEXICO. (N.T. JOFFRED, 7/10/98, PP. 128, 134.)

NGN HAD BEEN LOOKING FOR A SEWING FACILITY OFF-SHORE OR IN MEXICO BUT HAD NOT OBTAINED ONE. *(ID.)*

NGN LOANED MACHINERY IT OWNED, AS IS COMMON PRACTICE IN THE APPAREL INDUSTRY, VALUED AT APPROXIMATELY $ 218,000, TO AMEX AT JACOBS' REQUEST AND WITH HIS CONSENT. (N.T. JOFFRED, 7/10/98, PP. 127-29; N.T. RUSH 8/4/99, PP. 259-61.)

IN DECEMBER 1996, NGN WAS SHORT OF WORKING CAPITAL. (N.T. JOFFRED, 7/10/98, P. 133.)

AT THAT TIME, JACOBS WITHDREW $202,216.67 FROM NGN, OUT OF HIS LOAN ACCOUNT, FOR THE PURCHASE OF THE EQUIPMENT THAT HAD BEEN SHIPPED TO AMEX. (N.T. JOFFRED, 7/10/98, PP. 131-33; EXHIBIT 29.)

THE BALANCE OF THE EQUIPMENT WAS NOT PURCHASED BY JACOBS FOR AMEX; NOR WAS THE EQUIPMENT JACOBS OBTAINED [*277] BY REDUCING HIS LOAN ACCOUNT EVER RETURNED TO NGN. (N.T. JOFFRED, 7/10/98, P. 133.)

JACOBS WITHDREW SAID $202,216.67 WITHOUT THE CONSENT OR PRIOR KNOWLEDGE OF THE PLAINTIFF.

IN OR ABOUT 1997, JACOBS AND VAN VU BOUGHT A FACILITY, KIMMEX, FOR THEMSELVES IN MEXICO. [20] (N.T. JACOBS, 10/13/98, P. 33.)**

NGN PAID THE COSTS OF JACOBS' AND VAN VU'S TRIPS TO MEXICO EVEN THOUGH THEY PURCHASED THE FACILITY THEY LOCATED IN THEIR OWN NAMES. *(ID.)*

JACOBS TRANSFERRED EQUIPMENT LOCATED AT AMEX TO KIMMEX, DURING JANUARY THROUGH JULY 1997; THE REST OF THE EQUIPMENT LOCATED AT AMEX WAS SOLD AND THE MONEY WAS REINVESTED IN EQUIPMENT FOR KIMMEX. (N.T. JACOBS, 10/13/98, P. 208; N.T. JOFFRED, 7/10/98, PP. 152-55); EXHIBIT 30.)

INCLUDED IN JACOBS' TRANSFERS OF EQUIPMENT FROM AMEX TO KIMMEX WAS $15,730 WORTH OF EQUIPMENT DIRECTLY OWNED BY NGN. (N.T. JACOBS, 10/13/98, PP. 194-96, 208; EXHIBIT 30.)

NGN NEVER GOT THIS EQUIPMENT BACK AND WAS NEVER PAID FOR IT.

NGN NEVER RECEIVED ANY BENEFIT OR THING OF VALUE FROM KIMMEX. (N.T. JACOBS 10/13/98, PP. 33-34.)

NEITHER JACOBS NOR KIM VAN VU EVER GAVE THE PLAINTIFF AN OPPORTUNITY TO INVEST IN KIMMEX. (N.T. JACOBS, 10/13/98, PP. 33-34.)

BY THE END OF 1996, JACOBS DID NOT DO THINGS FOR NGN WHICH HE SHOULD HAVE DONE TO IMPROVE PRODUCTION. (N.T. JOFFRED, 7/10/98, P. 144.)

[*278]

J.C. PENNEY, A MAJOR CLIENT OF NGN, DEMANDED THAT JOFFRED TAKE OVER RESPONSIBILITY FOR QUALITY [21] CONTROL FROM JACOBS BECAUSE OF ITS CONCERNS ABOUT THE QUALITY AND TIMELINESS OF DELIVERIES. (N.T. JOFFRED, 8/5/99, PP. 522-24.)**

IN JUNE OR JULY OF 1997, TWO MONTHS BEFORE THE TRIAL IN THIS LAWSUIT, RUSH AND FRIEDMAN STOPPED ACCEPTING ORDERS FOR NGN AND RGC, DESPITE THE FACT THAT DURING THE PRIOR SIX MONTHS, NGN AND RGC HAD SOLD APPROXIMATELY $18 MILLION WORTH OF GOODS, HAD PAID OFF ITS $500,000

OVERADVANCE, AND WAS STILL AN ONGOING CONCERN. (N.T. JOFFRED, 7/10/98, PP. 138-40.)

AT LEAST PART OF THE REASON RUSH AND FRIEDMAN STOPPED ACCEPTING ORDERS FOR NGN AND RGC WAS THE VIENER LITIGATION. *(ID.)*

PRIOR TO THE SHUTDOWN OF NGN, A TURNAROUND SPECIALIST HAD BEEN BROUGHT IN AND DETERMINED THAT THE COMPANY COULD GO FORWARD, BUT NOT WITH RUSH AND FRIEDMAN. (N.T. JOFFRED, 8/5/99, PP. 538-41.)

THERE WAS NO EVIDENCE PRESENTED THAT THE CONSULTANT'S CONCLUSIONS WERE EVEN PRESENTED TO THE BOARD AND SHAREHOLDERS OF NGN, OR EVEN TIMELY DISCLOSED TO VIENER.

THE LOSSES WHICH NGN AND RGC SUSTAINED IN 1995 AND 1996 CONSUMED CLOSE TO 90 PERCENT OF THEIR NET WORTH (*ID.*, P. 43, P82.)

THE DECLINE IN THE SALES AND MARGINS OF NGN WAS MULTIDETERMINED, BOTH PRIOR [22] TO, AND AFTER, VIENER'S DISCHARGE: RAMPANT LAXNESS IN INTERNAL CONTROLS IN THE AREAS OF RESPONSIBILITY OF EACH OF THE THREE SHAREHOLDERS, JACOB'S BUILD-UP OF INVENTORY AND UNREALISTIC PROJECTIONS, EXCESSIVE COSTS IN PRODUCTION AND PROBLEMS [*279] WITH QUALITY CONTROL, EXCESSIVE CHARGEBACKS, CANCELLATIONS OF SALES FROM LARGE CUSTOMERS LIKE J.C. PENNEY, RUSH'S FAILURE TO BOOK PENNEY'S BUSINESS,**

AND HIS WEAK SALES PERFORMANCE, FRIEDMAN'S RELIANCE ON A PURCHASE FORECAST FROM TARGET WHICH CHOKED THE COMPANY WHEN IT DID NOT MATERIALIZE, RUSH AND FRIEDMAN'S FAILURE TO BOOK FUTURE SALES FOR NGN, AND THE INDUSTRYWIDE SLUMP IN THE DOMESTIC APPAREL INDUSTRY, BEGINNING IN LATE 1995, DUE TO OFFSHORE COMPETITION.

EVEN THOUGH JOFFRED HAD THE ABILITY TO FIRE JACOBS AND RUSH, IF HE DID SO, JACOBS AND RUSH COULD HAVE VOTED TO REMOVE JOFFRED AS PRESIDENT. (N.T. RUSH, 8/3/99, P. 361.)

WHILE JOFFRED WAS AWARE OF THE CHALLENGES FACING DOMESTIC APPAREL MANUFACTURERS, HE UNDERSTOOD THAT IF THE COMPANY WERE WELL MANAGED, IT WOULD SUCCEED. (N.T. JOFFRED, 8/6/99, PP. 610-11.) NUMEROUS OTHER DOMESTIC-BASED SUPPLIERS OF APPAREL SURVIVED THIS COMPETITION. (N.T. RUSH, 8/3/99, PP. 276-77).

[23] ON JULY 3, 1997, VIENER WAS SENT A LETTER, FOLLOWING A MEETING OF JOFFRED, JACOBS AND FRIEDMAN, INFORMING HIM OF JOFFRED, JACOBS, FRIEDMAN AND RUSH'S DECISION TO NO LONGER DEVOTE THEIR CAREERS TO THE BUSINESSES AND ADVISING HIM THAT AN ORDERLY WIND-DOWN WAS THE ONLY RESPONSIBLE COURSE TO FOLLOW. JOFFRED REQUESTED A SPECIAL DIRECTORS' MEETING AS SOON AS POSSIBLE. (EXHIBIT 31.)**

JOFFRED RESIGNED AS PRESIDENT OF NGN, IN PART, BECAUSE HE NO LONGER WANTED TO

BE RESPONSIBLE FOR WHAT RUSH, JACOBS AND FRIEDMAN MIGHT DO AND DID NOT TRUST THEM. (*ID.*, PP. 160-61.)

[*280]

NGN AND RGC CEASED THEIR OPERATIONS ON OR ABOUT AUGUST 31, 1997. (EXHIBIT 31.)

III. DISCUSSION

In the context of a closely-held corporation, the United States District Court for the Western District of Pennsylvania has noted that the "survival of the business association is perilously tied to the continuing vitality of intimate personal relationships." *Orchard v. Covelli* 590 F. Supp. 1548, 1550 (W.D. Pa. 1984). Close corporation shareholders have limited options if they become disenchanted with the way a corporation is being run or how they are being treated. This fact often leads to costly [**24] and protracted lawsuits. This is the case before us. Like Judge Weber in *Orchard supra*, we bind ourselves to a careful balance of equities in fashioning appropriate relief under the unique circumstances of this case.

Wrongful Discharge

Plaintiff argues NGN, acting through its board of directors, acted improperly in terminating his employment with NGN.

He also argues RGC, acting through its board of directors, acted improperly in terminating his employment with RGC.

These claims are properly claims against NGN and RGC and since NGN and RGC are in bankruptcy, all proceedings against these corporations are stayed and we cannot proceed further against them until the bankruptcy stay is lifted.

[*281] We will, and do, later consider the effect of Viener's discharge from his employment with NGN and

RGC in relation to his claim that Jacobs squeezed him out of his positions with NGN and RGC.

Conspiracy

Plaintiff also seeks damages for the overt acts of Jacobs, Rush, Joffred and Friedman which Viener argues constituted a conspiracy to deprive him of his rights as a minority shareholder.

Generally, the acts of the agents of the corporation are the acts of [**25] the corporation. *Daniel Adams Associates v. Rimbach Publishing Inc.*, 360 Pa. Super. 72, 519 A.2d 997 (1987). A single entity cannot conspire with itself, and, similarly, agents of a single entity cannot conspire among themselves. *Rutherford v. Presbyterian-University Hospital*, 417 Pa. Super. 316, 333-34, 612 A.2d 500, 508 (1992).

In the case sub judice, the complaint alleges a conspiracy among NGN's agents and is, in effect, an allegation that NGN, and the RGC, each, conspired with itself. A corporation cannot conspire with itself. *Nix v. Temple University*, 408 Pa. Super. 369, 380 n.3, 596 A.2d 1132, 1137 n.3 (1991).

Breach of Fiduciary Duty

Finally, plaintiff alleges that the majority shareholders, Jacobs and Rush, breached their fiduciary duty of good faith and loyalty by systematically excluding him from any meaningful role in the corporate activities of NGN and RGC for no legitimate business purpose; said exclusion was designed to compel him to dispose of [*282] his interest in these businesses for less than its fair market value. Plaintiff claims this constituted oppressive conduct by the majority shareholders and [**26] a violation of their duty to him.

Defendants argue that, under Pennsylvania law, the business judgment rule prevents this court from "second-

guessing" the business decisions of corporate management in the absence of fraud, self-dealing or other misconduct, citing *Cuker v. Mikalauskas*, 547 Pa. 600, 692 A.2d 1042 (1997). The business judgment rule insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interests of the corporation. *Id.* at 606, 692 A.2d at 1045. We find that the business judgment rule does not preclude this court from examining a majority shareholder's oppressive conduct toward a minority shareholder in a closely-held corporation.

Furthermore, plaintiff has presented evidence to establish fraud, self-dealing, self-interest and misconduct by majority shareholder Jacobs.[4]

[**27]

[*283] Courts have consistently recognized that the duty of loyalty owed to the corporation by the controlling interest holders includes a duty of loyalty and fairness to minority shareholders. *Orchard, supra* at 1556. (citations omitted) Where a majority shareholder stands to benefit from his decisions as a controlling stockholder, the law requires that the majority's action be "intrinsically fair" to the minority interest, *Id.* Self dealing is present when the

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[4] We will not address the claim against Rush because of the bankruptcy filing. Viener also claims breach of fiduciary duty against Michael A. Joffred. Joffred was not a majority shareholder of NGN and we find no evidence of liability on his part. We note that, from our vantage point, Joffred's culpability in this matter seemed to stem from his hubris in thinking he could control this herd of cats. The parties have agreed that Friedman had no role in removing Viener from NGN and plaintiff no longer seeks relief from him.

minority shareholder is denied the right to participate in the benefits of the corporation, *Id.* It is well recognized that "a majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interest at the expense of the corporate interests." *Id.* at 1557, quoting *United States v. Byrum*, 408 U.S. 125, 92 S. Ct. 2382, 33 L. Ed. 2d 238 (1972).

The Pennsylvania Business Corporation Law of 1988 provides limited protection, under 15 Pa.C.S. § 1767, for a minority shareholder who can prove oppressive conduct[5] toward him by the directors or those in control of the closely held corporation.[6] Section 1767, however, [**28] only provides for the appointment of a custodian of the corporation on deadlock or other cause.[7] [*284] There is little case law under section 1767 to guide the courts. Plaintiff is no longer seeking the appointment of a custodian as NGN has ceased its operations.

[**29]

Under the common law, majority shareholders have a duty to protect the interests of the minority shareholder.

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[5] The Pennsylvania Commonwealth Court has adopted New York's definition of oppressive acts: "Oppressive actions refer to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise." *Gee v. Blue Stone Heights Hunting Club Inc.* 145 Pa. Commw. 658, 604 A.2d 1141, 1145 (1992). (citation omitted)

[6] The committee comment to section 1767 makes reference to "oppressive conduct" in the form of freezing-out a minority shareholder by removing him from his various offices or by substantially diminishing his power or compensation.

[7] In order to be entitled to this remedy, plaintiff must establish that, in the case of a closely held corporation, the directors or those in control of the corporation have acted illegally, oppressively or fraudulently toward one or more holders of 5 percent or more of the outstanding shares of any class of the corporation in their capacity as shareholders, directors, officers or employees.

Ferber v. American Lamp Corp. 503 Pa. 489, 496, 469 A.2d 1046, 1050 (1983); see also, *ARC Manufacturing Co. v. Konrad*, 321 Pa. Super. 72, 78, 467 A.2d 1133, 1138 (1983). The Pennsylvania Supreme Court has stated that "majority [shareholders] occupy a quasifiduciary relation toward the minority which prevents them from using their power in such a way as to exclude the minority *from their proper share of the benefits accruing from the enterprise." Ferber* at 496, 469 A.2d at 1050. (citation omitted) (emphasis in original) "This does not mean . . . that majority shareholders may never act in their own interest, but when they do act in their own interest, it must also be in the best interest of all shareholders and the corporation." *Id.*

Judge Weber, in *Orchard v. Covelli*, 590 F. Supp. 1548 (U.S.D.C. W.D. Pa. 1984), persuasively states:

> "Adherence by the majority interest to a fiduciary duty of strict fairness is particularly critical in the context of the closely held corporation. The acute vulnerability [**30] of minority shareholders in the closely held corporation is well recognized. It stems principally from two factors. Because of its controlling interest, the majority is able to dictate to the minority the manner in [*285] which the corporation shall be run. In addition, shares in closed corporations are not publicly traded and a fair market for these shares is seldom available. In contrast, a partner can act to dissolve a partnership and a shareholder in a large public-issue corporation can sell his stock on the market if he is dissatisfied with the way things are run. Dissension within the close corporation

> tends to make the minority interest even more unattractive to a prospective purchaser. As a consequence, a shareholder challenging the majority in a close corporation finds himself on the horns of a dilemma, he can neither profitably leave nor safely stay with the corporation. In reality, the only prospective buyer turns out to be the majority shareholder." *Id.* at 1557.

The district court held that any attempt to "squeeze out" a minority shareholder must be viewed as a breach of fiduciary duty. *Id.* at 1557. "The reasons for excluding an obstreperous [**31] shareholder may often appear compelling to the majority, and the conduct which eventually leads to a 'squeeze-out' may not have been undertaken with such an intent. Yet the conduct is injurious when the result is the exclusion of minority shareholders without adequate recompense and it is particularly harmful when carried out with malevolence or indifference. The law recognizes a right to recovery under such circumstances." *Id.*

In *ARC Mfg., supra*, the Pennsylvania Superior Court affirmed the chancellor's finding of a breach of fiduciary duty by the shareholders/directors where they, inter alia: called a special meeting without notice to the minority shareholder in attempting to remove him as president, changed the locks on the company premises [*286] and refused to permit the minority shareholder to have reasonable access to the premises while he remained a director of the corporations, attempted to exclude the minority shareholder from access to the business records of the corporation and from participation in meaningful decisions involving corporate affairs, and attempted to transfer the management functions of the board of directors to an executive committee. [**32] *Id.* at 80-81, 467 A.2d

1137-38. The Superior Court determined that this was a breach of fiduciary duty and granted the minority shareholder relief, *i.e.* in that case, the appointment of a receiver. The court, in doing this, attempted to preserve the otherwise thriving business which was being threatened by the shareholders' inability to get along with each other. *Id.*

In this case sub judice, the appointment of a custodian is inapplicable because the business is no longer an ongoing concern and has, in fact, gone into bankruptcy.

In *Orchard, supra*, the district court found that the fiduciary duty owed the minority shareholder was all but ignored by the defendant. It found a systematic effort to exclude Orchard from any meaningful role in the corporations, as well as an effort to deny him benefits therefrom by insisting Orchard accept a proposed stock redemption agreement covering Orchard's holdings in six restaurants, without compensation for Orchard's interest in a seventh store. It further found that the defendant exploited his bargaining position to the detriment of the minority shareholder, failed to use his best efforts to procure the [**33] continued life of the existing franchises in the names of the corporations by [*287] opening additional restaurants within the corporations' exclusive territory or by use of their operating funds. In the end, Orchard was left with an interest in the corporate shells. *Id.* at 1558. The district court determined that, in order to adequately address Orchard's claim of breach of fiduciary duty and bring the business dealings of the parties to an end, the appropriate remedy was to order the defendants to provide Orchard the fair value of his interest in the corporation at the buyout offer price made in 1977, when the breaches occurred. *Id.* at 1560.

We look to the facts of this case with these principles in mind:

In January 1983, plaintiff Viener and defendants Jacobs and Rush capitalized and incorporated N.G.N. Inc. (the acronym for Neal, George and Norman, their first names), a closely held corporation organized and existing under the laws of Pennsylvania to engage in the textile and apparel business. NGN utilized subcontractors to cut, sew and assemble the garments. Viener, Jacobs and Rush owned all of the issued and outstanding stock of NGN and [**34] have continuously constituted the entire board of directors of NGN since its formation. The company's three directors appointed Rush to be chairman and Viener to be president of the company. Each of the three shareholders was assigned specific areas of responsibility: Rush had sales and marketing, Jacobs had production and Viener was responsible for fabric, financial accounting and general administrative functions. Each shareholder earned the same salary for the work he performed for the company. Each investor/owner received special consideration and benefits not [*288] available to the other employees, including luxury cars, disability insurance at $8,000 per month for the duration of any disability of a shareholder, and comprehensive life insurance. The shareholders maintained loan accounts with the corporation (accounts in which the shareholders allowed money they had earned, or which they had advanced to the corporation, to be retained), absent notes or loan agreements, which gave the corporation a source of working capital. Viener supplied the building, without profit, whereby NGN conducted its operations. Viener's experience in the business, particularly yarn and fabric [**35] purchasing, was a substantial asset. During Viener's term as president NGN grew dramatically.

NGN purchased fabric and marketed the men's apparel line and RGC marketed the ladies' apparel line, As an owner/investor and officer of NGN and RGC, Viener

received detailed information regarding their operations and performance on a regular basis, including weekly reports on the operations and production, the status of financing and cash flow, budgeting information and planning information regarding expansion and acquisition of new facilities. He had access to all of the affiliates' facilities and employees.

From the beginning of the company, the owners/shareholders critiqued and complained of each other's work performance. NGN soon grew even larger and problems arose. Net sales and gross profit margins declined. Dissatisfaction increased among the shareholders: Rush complained about Viener's performance, Viener complained about Jacobs' performance. Blame and finger-pointing began; tensions grew.

[*289] Beginning in 1994, Viener expressed legitimate concerns about cash payments that were being made by NGN to one of its subcontractors, Kim Van Vu and her company, N.V. Sportswear, for [**36] a line of cheap T-shirts. N.V. Sportswear had grown to become one of NGN's largest subcontractors and Jacobs eventually kept it in operation full-time. Payments were often made to Van Vu in cash; these payments rose from $600 to, in later years, $1,200 per week.

In 1994, Viener asked Michael Joffred, then auditor to NGN, to check into the legality of these cash payments. NGN's board was advised by Robert Firely of Beard & Co., at its May 18, 1994 meeting, that cash payments to Kim NV Inc. were okay since her entity was a corporation. Joffred questioned that representation, but the payments continued, even though Joffred later admitted that cash payments to subcontractors was bad business practice. Viener was dependent on Joffred's advice and counsel and relied on it in permitting continued cash payments to Kim Van Vu at Jacobs' request.

On August 4, 1994, Rush and Jacobs voted to remove Viener as president.

In September 1994, Firely advised Jacobs that the $ 1,200 per week which was being credited as being paid on account for N.V. Sportswear was in fact for garment repairs and for debt on the marker machine rather than for the cheap T-shirt program, and wrote a memo to confirm [**37] the advice.

By October 1994, NGN had hired Joffred as president in order to bring in professional management. In December 1994, Joffred confirmed to Viener that he, [*290] Viener, would not have any meaningful role in the company.

Joffred immediately adopted a policy prohibiting cash payments to subcontractors. Nonetheless, in late 1994, at Jacobs' direction, Crown-Globe, a subcontractor of NGN's, submitted invoices of $53,276.59 for "price adjustments" to NGN. Douglas Wolfe, president of Crown-Globe, was aware that these invoices were not due Crown-Globe and were, in fact, a means of getting cash to pay Kim Van Vu.

Jacobs had Wolfe advance almost all the cash back to Jacobs, which Jacobs then gave to Van Vu or N.V. Sportswear, a business entity owned by Van Vu.

NGN received no benefit from this transaction.

We find the payment of the $53,276.59 was made through Crown-Globe to Jacobs, Van Vu and/or N.V. Sportswear to disguise what was being done and make it difficult for Viener and/or an auditor to discover that Jacobs had taken money out of NGN and paid it to himself or his designees.

Jacobs also attempted to do the same thing a second time. He caused Crown-Globe to send [**38] invoices for an additional $48,135.61 to NGN in an attempt to get this additional money from NGN to Jacobs and/or Van Vu, without the payment appearing on the books.

Fortunately, Joffred, then president of NGN, refused to pay the invoices.

On January 27, 1995, Viener was advised in a letter that the board had determined to terminate his employment. This initial meeting was held without notice to Viener. Viener was fired as an employee at a February [*291] board meeting but remained a director and shareholder in the businesses. Contemporaneously with Viener's discharge, Rush and Jacobs offered to purchase Viener's stock in NGN and RGC at its book value payable over five years, or alternatively to sell their stock on the same terms. Neither buyout took place, in part, because of the distrust that had arisen between the shareholders.

Then, shortly after Viener's termination, NGN ceased its practice of having regular quarterly board meetings. The locks on the doors at NGN and Ellmar were changed so Viener no longer had physical access to the facilities; Jacobs had a set of keys but Viener did not. A memo was sent to all employees that if they spoke to Viener, they would be fired. [**39] Viener was no longer provided with the detailed information he had received as an owner and investor in the companies, and he was excluded from compensation decisions when a compensation committee was set up consisting of all the other shareholders, directors and Joffred, but not Viener. Joffred acknowledged that Viener was fired for asking questions and we find that this is one of the reasons Viener was removed. Viener was labeled as disruptive and lawyers were brought into the fray.

Later in 1995, NGN loaned machinery it owned to Amex, a facility in Mexico, and supplied fabric to it. NGN had for a number of years been looking to acquire a sewing facility offshore to remain competitive by lowering labor costs. Jacobs and Kim Van Vu traveled to El Salvador and Mexico to find such a facility and these trips were paid for

by NGN. NGN was never repaid for these expenses once Jacobs and Van Vu bought a facility in their own names.

[*292] NGN used Amex and then another Mexican facility for offshore production for a short time, but nothing came of these affiliations. Jacobs himself sought an interest in Amex but did not obtain one.

In December 1996, Jacobs reduced his loan account [**40] with NGN by $202,216.67, without a board meeting and without notice to Viener, at a time when the company was very short in cash. NGN acquired no interest in Amex.

By the end of 1996, Jacobs had gotten lazy and admittedly did not do things he should have done to improve production. After a consulting firm was brought in and was critical of his performance, Jacobs was relieved of his production responsibilities and duties. J.C. Penney demanded Joffred take over quality control from Jacobs because of its concerns about the quality and timeliness of deliveries. The losses which NGN and RGC sustained in 1995 and 1996 consumed close to 90 percent of their net worth.

Around 1997, Jacobs and Van Vu bought another Mexican facility, Kimmex, in their own names. Jacobs shipped the Amex equipment he purchased, along with $15,730 worth of NGN equipment, to Kimmex. NGN was not paid for its equipment.

At one point in 1997, Joffred had gone to the NGN plant and saw equipment packed and crated for Mexico. He asked Jacobs, "What the hell is up?" Jacobs replied that the equipment was going to the plant in Mexico, to be used at Kimmex. He explained that it was going to generate cost savings for NGN [**41] and RGC. Joffred informed him that these were collateralized assets owned by CoreStates Bank. Jacobs was aware that the agreements [*293] with CoreStates prevented the transfer of these assets. After this

happened, Joffred prepared a list of all the fixed assets that had been transferred to Mexico. NGN received no benefit from Kimmex and Viener was not given an opportunity to invest in it.

We find Jacobs' transfer of the $15,730 worth of NGN's equipment to Kimmex without compensation to NGN was a misappropriation of NGN's property and was, under the circumstances, outrageous. Jacobs knowingly violated NGN's obligations to CoreStates Bank and his actions could have jeopardized or destroyed NGN's credit.

Jacobs' actions during the time-frame involved were not justified by his willingness to advance money to NGN from time to time. This fact did not, and could not, give Jacobs the right to take NGN's money without corporate approval even though NGN may have owed him money at the time, and it did not give him the right to take NGN's equipment. His position with NGN did not entitle him to treat NGN and its assets as his own.

Early in 1997 or thereabouts, a turnaround specialist [**42] was brought in to NGN and it was determined that the company could go forward, but not with Rush and Friedman. These conclusions were not presented to the board or timely disclosed to Viener. Joffred knew that it the company was well managed, despite the challenges facing domestic apparel manufacturers, it could succeed. Numerous other domestic-based suppliers of apparel survived the offshore competition. But even though Joffred had the ability to fire Jacobs and Rush, if he did so, they could just turn around and remove him from office.

[*294] In June and July of 1997, Rush and Friedman stopped accepting orders for NGN and RGC, despite the fact that during the prior six months, NGN and RGC had sold approximately $18 million worth of goods, had paid off its $500,000 overadvance, and was still an ongoing

concern. Part of the reason they stopped the bookings was the Viener litigation.

The decline in the sales and margins of NGN was multi-determined both prior to, and after, Viener's discharge. There was rampant laxness in internal controls in the areas of responsibility of each of the three shareholders, Viener, Jacobs and Rush. There were unrealistic sales projections and a [**43] build-up of inventory, as well as excessive costs in production and problems with quality control under Jacobs' watch. The cancellation of sales from large customers like J.C. Penney's, and Friedman's reliance on a purchase forecast from Target which did not materialize, nearly choked the company. Rush's failure to book Penney's business and his weak sales performance was very costly to NGN. The industry-wide slump in the domestic apparel industry certainly was a large factor in the reduction of sales and margins, but Rush's and Friedman's failure to book future sales for NGN and RGC put the nail in the coffin. Joffred himself was flabbergasted by this conduct, as the company had had $18 million in sales in the prior six months, had paid off a $500,000 overadvance and was still a viable business.

On July 3, 1997, Viener was informed by letter of Joffred, Jacobs, Friedman and Rush's decisions to no longer devote their careers to the businesses and advised him that a wind-down of the business was the only [*295] responsible course to follow. Joffred resigned as president, in part, because he no longer wanted to be responsible for what Rush, Jacobs and Friedman might do and did [**44] not trust them, A special directors' meeting was called and NGN and RGC ceased operations on or about August 31, 1997.

We find that, on these facts, plaintiff has established oppressive conduct on the part of majority shareholder

Jacobs. We will not be persuaded to overlook Jacobs' misconduct simply because it did not involve a great deal of money or because he loaned money to the company and guaranteed its loans.

We further find that the majority shareholders' decision to strip from Viener any meaningful role in the companies he co-founded was not made under proper circumstances. Jacobs squeezed Viener out of NGN and RGC, by using seemingly legitimate means, because he wanted Viener to go away quietly. Viener was denied access to information, the facilities and then his proper share of the benefits accruing from NGN and RGC. The majority shareholders retaliated against Viener, in part because of this litigation, and left him with an interest in a corporate shell.

We decline to adopt a policy of judicial noninterference where majority shareholders misuse their power to pursue their own self-interests, oppress a minority shareholder for raising legitimate concerns, and fail to protect [**45] his interests, which is their duty.

The conduct of Jacobs in causing Crown-Globe to submit invoices to NGN when NGN did not owe Crown-Globe and in causing Douglas Wolfe to then turn that [*296] money over to Jacobs so Jacobs could get cash to Van Vu, is outrageous.

Jacobs also had approximately $218,000 worth of equipment sent to Amex and reduced his loan account with NGN by $202,216.67 for the purchase of this equipment for Kimmex at a time when NGN was very short of cash. When Jacobs then transferred $15,730 worth of NGN equipment to Kimmex, this was never authorized through its president. NGN never got this equipment back and NGN was never paid for it. Neither Joffred, nor NGN's board of directors, nor anyone else other than Jacobs, who had no authority to act for the corporation in this way,

approved this transfer. Neither Kimmex nor anyone else paid NGN for this equipment and NGN never received anything of value for the equipment.

Whatever criminal wrongs were or were not done by these transactions, they were unauthorized actions--conversions--designed to reduce NGN's assets and reduce the value of Viener's NGN stock.

We find this course of conduct on Jacobs' part [**46] was also outrageous.

For all these reasons, we find Jacobs, as a majority stockholder in NGN, breached his fiduciary duty to Viener and that Viener has established his claim against Jacobs.

We also find that Jacobs excluded Viener from an appropriate role in RGC, being guilty of all the same infractions as he was in regard to NGN, except that Jacobs did not misappropriate any of RGC's money or other assets. We find Jacobs as a majority shareholder in RGC breached his fiduciary duty to Viener as a minority [*297] shareholder in RGC and is liable to Viener as a result.

Majority shareholders in closely held corporations are put on notice that their actions will be judged under a standard of strict fairness to the minority shareholder.

Accordingly, we find that Viener is entitled to relief from Jacobs and furthermore, is entitled to punitive damages from Jacobs because of Jacobs' outrageous conduct in misappropriating NGN's assets and money.

The issue remains--what should be the type and measure of relief which we can grant Viener.

We find the remedy granted by the United States District Court for the Western District of Pennsylvania the appropriate remedy here. *Orchard, supra*, p. 1560. [**47]

In *Orchard* the court found a breach of fiduciary duty in a minority stockholder's suit and ordered the defendants, including the majority stockholder, to provide the minority

stockholder with the fair value of his interest in the corporation by buying him out.

In *Orchard*, the majority shareholder had offered the minority stockholder a fixed amount for his interest in the corporations involved and the court found the offered price fair and adequate.

We, therefore, will proceed in the case at bar to hear evidence in the damage phase of the trial as to what Viener is entitled to--book value for his shares, as provided in the shareholder agreement (exhibit 5), the fair value of his interest in NGN and RGC or some other proper basis, the date as to when the damages should be fixed, and any related damages, not to include compensation for lost salary.

[*298] Although this is not a tort action at law, it is an action involving, as we have determined, outrageous conduct and we find a claim for punitive damages appropriate here. This is not a contract claim.

Therefore, we will hear evidence to determine the appropriate amount of punitive damages which will appropriately punish [**48] Jacobs for his outrageous conduct.

IV. CONCLUSIONS OF LAW

Jacobs breached the fiduciary duty he owed Viener as a majority stockholder in NGN and RGC.

Jacobs is required to purchase Viener's stock in NGN and RGC at an appropriate price, as of an appropriate time.

Jacobs' outrageous conduct makes him liable for punitive damages.

Viener is entitled to punitive damages from Jacobs for Jacobs' outrageous conduct.

We will schedule a date for the trial on damages. At that trial the parties may present evidence to establish the appropriate damages, compensatory and punitive.

Accordingly, we enter the following decree nisi:

DECREE NISI

And now, June 30, 2000, after a non-jury trial on liability only, and in consideration of the foregoing opinion, the court finds an award in favor of the plaintiff, George Viener, and against the defendant, Neil Jacobs, on Count I, breach of fiduciary duty, and a constructive trust is imposed upon Neil Jacobs, in favor of plaintiff, [*299] in an amount to be determined in the damages phase of the trial.

It is further ordered that judgment is entered in favor of defendants Michael A. Joffred and Nagan Leasing Inc., Energy Knits Inc. [**49], Little Creek Mills Inc., Amity Finishing Inc. and G.N.K. Partnership, and against the plaintiff, on Count I, and said defendants are dismissed from this suit.

It is further ordered that Allen Friedman is dismissed as a defendant in this action.

It is further ordered that this action is stayed as to defendants NGN Inc., Reading Garment Company Inc., Ellmar Manufacturing Inc., Reading Dyeing and Finishing Inc. and LCMA Inc. on account of their bankruptcy filing.

It is further ordered that this action is stayed as to defendant Norman Rush on account of his bankruptcy filing.

It is further ordered that Count IV, for conspiracy, is dismissed.

It is further ordered that the damages phase of the non-jury trial be heard on September 7, 2000, at 9:30 a.m., in the courtroom assigned.

The time for filing of exceptions to this decree nisi is continued until 10 days after the damage phase of the non-jury trial has concluded.

Editor's Note: This case is currently on appeal with the Superior Court.

APPENDIX B

VIENER V. JACOBS

No. 00-6385

COMMON PLEAS COURT OF
BERKS COUNTY,
PENNSYLVANIA

52 Pa. D. & C.4th 353; 2001
Pa. D. & C. LEXIS 78

April 24, 2001, Decided

DISPOSITION: The court entered an award in favor of the plaintiff and against the defendant for breach of fiduciary duty, and a constructive trust was imposed. Punitive damages were awarded in favor of the plaintiff and against the defendant.

COUNSEL: [**1] Rees Griffiths and David M. Kozloff, for plaintiff.

John J. Miravich, for defendant Jacobs.

JUDGES: SCHAEFFER, S.J.

OPINION BY: SCHAEFFER

OPINION:

[*354] INTRODUCTION

George P. Viener filed suit against Neal Jacobs, Norman Rush, Michael A. Joffred, Allen Friedman, N.G.N. Inc., Reading Garment Company Inc., Ellmar Manufacturing Inc., Nagan Leasing Inc., Energy Knits Inc.,

Reading Dyeing and Finishing Inc., Little Creek Mills Inc., LCMA Inc., Amity Finishing Inc. and G.N.K. Partnership for breach of fiduciary duty, wrongful discharge, a shareholder derivative claim and conspiracy.

A non-jury trial was held on liability only and the court filed its adjudication on June 30, 2000. Norman Rush, NGN, RGC, Ellmar, LCMA, and Reading Dyeing have all been adjudicated bankrupt and all proceedings in this action are stayed as to them.

No evidence was presented at the non-jury trial which made Nagan, Energy, Reading Dyeing, Little Creek, Amity or GNK liable to Viener and, therefore, Nagan, Energy, Reading Dyeing, Little Creek, Amity and GNK were dismissed as party defendants.

No evidence was presented at the non-jury trial which made Joffred liable to plaintiff and therefore, Joffred was [*355] [**2] dismissed as a defendant. Friedman was dismissed by agreement.

Jacobs was found liable for the breach of his fiduciary duty to minority shareholder Viener and for his outrageous conduct. The issues remaining are to determine: (1) the date as to when the damages should be fixed; (2) the proper value of Viener's shares in NGN and RGC and any related damages; and (3) the appropriate amount of punitive damages that would punish Jacobs for his outrageous conduct. On September 8, 9, 12, 20, and 28, 2000, the court heard the evidence related to these issues in the damages phase of the trial. On April 3, 2001, the court permitted the record to be reopened for rebuttal evidence. In addition to this opinion, we incorporate by reference, and adopt for our reasoning, the adjudication filed in this matter on June 30, 2000. We now enter the following findings of fact:

II. FINDINGS OF FACT

Compensatory Damages Valuation Date

IN THE WINTER OF 1995, THE MAJORITY SHAREHOLDERS, JACOBS AND RUSH, FROZE MINORITY SHAREHOLDER VIENER OUT OF THE SUBCHAPTER S CORPORATIONS THAT HE HAD CO-FOUNDED.

THE APPROPRIATE VALUATION DATE TO DETERMINE VIENER'S INTEREST IN NGN AND RGC IS DECEMBER 31, 1994. [3]**

DECEMBER 31, 1994 IS THE MOST APPROPRIATE DATE FOR THE FOLLOWING REASONS:

Viener was terminated as an officer of NGN and related companies on February 3, 1995;

After February 3, 1995, Viener had no meaningful role in the management and direction of NGN and its related companies;

[*356]

After Viener's termination, company officers made a series of critical decisions which contributed to the failure of the business and in which Viener did not participate, including: (1) a determination to borrow substantial additional monies from local banks; (2) the adoption of annual business plans which called for sales substantially in excess of the company's past experience--plans which were never adjusted to changing market conditions; (3) the adoption of inventory practices, including, but not limited to, the manufacture by Ms. Van Vu and stockpiling of substantial quantities of inventory months in advance of sales; (4) the build-up of an excessive $7 million in inventory; (5) ceasing to take orders for sales of garments; (6) agreeing that an off-shore subsidiary was important to NGN's future success, but allowing such facility to be set

up and totally owned by Jacobs [**4] and Ms. Van Vu; and (7) electing to close the company's doors despite the fact that the company remained viable. All of the foregoing had a substantial negative impact on NGN's prospects.

Viener objected strenuously to all the foregoing decisions." (N.T. 270-71, 667, 675-76, 699.)

MANY OTHER TEXTILE COMPANIES, WHICH WERE WELL MANAGED DURING THESE TIMES OF CHANGING ECONOMIC CONDITIONS IN THE APPAREL INDUSTRY, SURVIVED.

NGN AND ITS SUBSIDIARIES WERE ENTITIES IN 1997 AND COULD HAVE CONTINUED HAD THEY BEEN WELL MANAGED. (N.T., JOFFRED, 8/6/99, PP. 610-11.)

JACOBS' PROBLEMS WITH THE MANAGEMENT OF THE COMPANY'S PRODUCTION FUNCTION AND HIS INCREASING INVOLVEMENT IN PURSUING HIS SELF-INTERESTS, SETTING UP A MEXICAN MANUFACTURING CONCERN FOR HIMSELF AND MS. VAN [*357] VU, RESULTED IN JOFFRED, THEN PRESIDENT OF NGN, REMOVING JACOBS AS HEAD OF PRODUCTION.

RUSH AND FRIEDMAN'S PERFORMANCE IN SALES AFTER VIENER'S REMOVAL WERE A WASTE OF TIME AND MONEY TO THE COMPANY. (N.T., JOFFRED, 8/5/99, PP. 525-26.)

VIENER'S PARTICIPATION IN ANNUAL BOARD MEETINGS IN 1995 AND 1996 TO REVIEW NGN'S YEAR-END FINANCIAL STATEMENTS, AND IN THE JULY 1997 MEETING, WERE A MERE FORMALITY. [5]**

SHARES OF NGN AND ITS RELATED ENTITIES ARE NOT READILY MARKETABLE

AND REPRESENT ILLIQUID INVESTMENTS. (N.T. PP. 177, 180.)

AFTER VIENER WAS FROZEN OUT, HE HAD NO OPPORTUNITY TO SELL HIS OWNERSHIP INTERESTS IN NGN AND RGC TO PERSONS OTHER THAN THE MAJORITY SHAREHOLDERS, AT A REASONABLE PRICE.

VIENER WAS EFFECTIVELY COMPELLED TO RETAIN HIS OWNERSHIP INTERESTS IN THESE COMPANIES WHILE DECISIONS MADE AND ACTIONS TAKEN BY OTHERS EFFECTIVELY DESTROYED THE VALUE OF HIS INVESTMENT.

THE USE OF A VALUATION DATE FOLLOWING VIENER'S DISCHARGE WOULD ALLOW JACOBS TO PROFIT FROM HIS WRONGFUL CONDUCT.

Value of Viener's Interest in NGN and RGC

NGN AND RGC HAD BEEN PROFITABLE AND HAD GROWN SUBSTANTIALLY DURING THE YEARS VIENER WAS INVOLVED IN THE MANAGEMENT AND OPERATION OF THE BUSINESSES.

THE COMPANIES' MANAGEMENT EXPECTED SUBSTANTIAL SALES GROWTH IN 1995 BASED ON PROJECTIONS FROM THEIR SALES PEOPLE. (N.T. PP. 674, 676.)

[*358]

THE MAJORITY SHAREHOLDERS ANTICIPATED THAT THE COMPANY WOULD GO PUBLIC IN FIVE YEARS AND REACH $50 MILLION IN SALES. (TRIAL EXHIBIT 55, JOFFRED NOTES 8/4/94.)

ON THEIR OWN, THE OWNERS HAD INFORMALLY VALUED THE BUSINESS [6] AT**

NGN AND RGC AT TWO TIMES THE BOOK NET WORTH OF THE TWO COMPANIES; AS OF DECEMBER 31, 1994, THE BOOK NET WORTH OF NGN AND RGC WAS $3.6 MILLION FOR BOTH COMPANIES. (N.T., VIENER, 9/8/00, P. 273.)

THIS VALUE WAS USED BY THE OWNERS TO FIX THE AMOUNT OF LIFE INSURANCE COVERAGE WHICH THE CORPORATION WAS REQUIRED TO CARRY ON EACH OWNER TO PROTECT THEIR INTERESTS. (N.T., 9/8/00, P. 273.)

ON AUGUST 27, 1990, THE PARTIES HAD ENTERED INTO A WRITTEN SHAREHOLDER AGREEMENT WHICH REQUIRED EACH SHAREHOLDER TO SELL HIS SHARES FOR NOT LESS THAN THE CURRENT BOOK VALUE AT THE TIME SPECIFIED IN THE OFFER NOTICE. (TRIAL EXHIBIT 5.)

THE SHAREHOLDERS AGREEMENT OF AUGUST 27, 1990 COVERED, INTER ALIA, THE FOLLOWING SITUATIONS:

a shareholder's sale of his shares in the event of his voluntary resignation;

purchase by the other shareholders in the event of the disability of a shareholder; or

the purchase of shares in the event of the death of any shareholder."

THE SHAREHOLDER AGREEMENT IS SILENT CONCERNING INVOLUNTARY TERMINATION OF A SHAREHOLDER'S EMPLOYMENT AND/OR HIS REMOVAL BY ACT OF THE CORPORATION ITSELF.

THE MAJORITY SHAREHOLDERS OFFERED TO BUY VIENER [7] OUT AT BOOK VALUE IN FEBRUARY AND MARCH 1995 IMMEDIATELY**

AFTER THEY FIRED HIM AND FROZE HIM OUT. (TRIAL EXHIBITS 21, 22, 66 AND PLAINTIFF'S DAMAGES TRIAL EXHIBIT 32.)

[*359]

AT THE TIME THE MAJORITY SHAREHOLDERS DISCHARGED VIENER, THEY EXPECTED AND ANTICIPATED THAT THE COMPANIES WOULD HAVE A BANNER YEAR IN 1995.

THESE SUBCHAPTER S COMPANIES HAD PRODUCED INCOME ATTRIBUTABLE TO EACH SHAREHOLDER WHICH AVERAGED BETWEEN $300,000 AND $375,000 PER YEAR IN SALARY AND DISTRIBUTIONS FOR THE PERIOD 1990 THROUGH 1994; IN SOME YEARS THIS WAS UP TO $450,000. (N.T., 8/11/97, PP. 161, 164.)

AS OF DECEMBER 31, 1994, VIENER'S INTEREST IN NGN AND RGC WAS WORTH $1,835,000. (N.T., WILUSZ, 9/7/00, PP. 168-80.)

THE EXPERT'S VALUATION, BASED ON TAX RETURNS FOR 1990 THROUGH 1994, FINANCIAL STATEMENTS AND THE SHAREHOLDER AGREEMENT, WAS CONSERVATIVE AND TOOK INTO ACCOUNT THE RISK THAT THE COMPANIES WOULD DO LESS THAN HALF AS WELL AS MANAGEMENT EXPECTED. (N.T. 9/7/00, P. 177.)

IN 1994, RGC DID NOT OPERATE ON A BREAK-EVEN LEVEL.

IN 1994, EACH SHAREHOLDER HAD A LOSS OF $20,983 RESULTING FROM RGC'S OPERATIONS. (PLAINTIFF'S EXHIBIT 15.)

VIENER HAD A 25 PERCENT INTEREST [8] IN RGC AND A 33 1/3 PERCENT INTEREST IN NGN.**

THE VALUE OF SHARES OF STOCK IN CLOSELY-HELD CORPORATIONS IS SOMETIMES DISCOUNTED TO REFLECT AN ILLIQUID MINORITY INTEREST. (N.T., 9/7/00, PP. 180-81.)

IT IS APPROPRIATE IN THIS CASE TO APPLY A MINORITY SHAREHOLDER'S DISCOUNT TO THE VALUE OF VIENER'S SHARES.

THE APPROPRIATE DISCOUNT TO BE APPLIED TO VIENER'S SHARE IS 35 PERCENT.

THE DEFENDANT PRESENTED NO EVIDENCE AS TO THE VALUE OF VIENER'S SHARES IN NGN AND RGC AS OF DECEMBER 31, 1994.

[*360]

APPLYING THE 35 PERCENT DISCOUNT, VIENER'S SHARES IN NGN AND RGC WERE WORTH $1.2 MILLION AS OF DECEMBER 31, 1994. (N.T., WILUSZ, 9/7/00, P. 180.)

VIENER'S STOCK IN NGN AND RGC IS NOW WORTHLESS.

JACOBS IS LIABLE TO VIENER FOR THE LOSS IN VALUE OF VIENER'S SHARES.

Punitive Damages

Nature of Jacobs' Conduct

JACOBS HAS CONTINUOUSLY DISREGARDED HIS FIDUCIARY DUTIES TO MINORITY SHAREHOLDER VIENER AND SUBORDINATED THOSE LEGAL DUTIES TO HIS PERSONAL RELATIONSHIP WITH A WOMAN NAMED KIM VAN VU, WHO BECAME NGN'S LARGEST SUBCONTRACTOR AND WHO IS NOW

JACOBS' "PARTNER" IN TWO APPAREL COMPANIES, NV SPORTSWEAR AND KIMMEX.

THESE TWO ENTITIES MAKE SPORTSWEAR [9] ITEMS WHICH ARE SIMILAR TO ITEMS MADE BY NGN AND WHICH ARE SOLD TO FORMER NGN CUSTOMERS, SPRINGFORD INDUSTRIES AND CHAMPION. (N.T. JACOBS, 9/12/00, PP. 460-63, 512.)**

JACOBS OWNS 49 PERCENT OF KIMMEX. (N.T., JACOBS, 9/8/00, P. 334.)

JACOBS CLAIMS HE RESIDES WITH MS. VAN VU AND HER FAMILY AS A "SQUATTER" IN CHULA VISTA, CALIFORNIA.

JACOBS AND VAN VU WORK TOGETHER IN NV SPORTSWEAR AND KIMMEX.

NV SPORTSWEAR HAS A FACILITY IN TIJUANA, MEXICO AND KIMMEX HAS A FACILITY IN JUAREZ, MEXICO. (N.T., JACOBS, 9/8/00, PP. 366-67.)

[*361]

WHILE JACOBS DENIES HE OWNS ANY INTEREST IN NV SPORTSWEAR, HE IS PAID COMPENSATION BASED UPON THE COMPANY'S PROFITS. (N.T., JACOBS, 9/12/00, PP. 464-66.)

JACOBS' EFFORTS TO PORTRAY HIMSELF AS DEPENDANT ON THE GENEROSITY OF MS. VAN VU FOR HIS LIVELIHOOD ARE ABSURD AND AN ATTEMPT TO DECEIVE THE COURT.

JOFFRED RESIGNED AS CEO OF NGN ON AUGUST 4, 1997 IN PART BECAUSE HE NO LONGER TRUSTED JACOBS AND RUSH. (ADJUDICATION, SCHAEFFER, JUNE 30, 2000, FINDING OF FACT NO. 116.)

AT ABOUT THIS TIME, JOFFRED CAUSED TO BE PREPARED A LIST OF EQUIPMENT TRANSFERRED TO MEXICO FROM NGN'S PLANT. (PLAINTIFF'S DAMAGE TRIAL EXHIBIT 29.) [10]**

JACOBS SENT EQUIPMENT VALUED AT $15,730, OWNED BY NGN, TO AMEX AND THEN TO KIMMEX IN MEXICO.

JACOBS SENT EQUIPMENT OWNED BY NGN AND VALUED AT $196,000 TO AMEX AND THEN TO KIMMEX IN MEXICO.

JACOBS TESTIFIED THAT HE "PAID" FOR THIS EQUIPMENT BY REDUCING THE AMOUNT NGN OWED HIM. (N.T., JACOBS, 9/12/00, PP. 473-74.)

JACOBS' OWN PERSONAL LOAN ACCOUNT WITH NGN SHOWED THE MONEY WHICH NGN OWED TO JACOBS.

JACOBS WAS NOT AUTHORIZED TO SHIP NGN'S EQUIPMENT TO MEXICO AND "PAY" FOR IT OUT OF THE MONEY HE TESTIFIED NGN OWED HIM.

NGN RECEIVED NO BENEFIT FROM NGN'S ASSETS BEING SHIPPED TO KIMMEX. (N.T., 9/20/00, PP. 701-703; ADJUDICATION, SCHAEFFER, 6/30/00, FINDINGS OF FACT NO. 98-103.)

JACOBS WAS UNABLE TO EXPLAIN OR RECONCILE HIS OWN PERSONAL LOAN ACCOUNT. (N.T., JACOBS, 9/12/00, P. 479.)

[*362]

THE NUMBERS ON JACOBS' ACCOUNT LEDGER DO NOT EQUAL THE AMOUNTS OF EQUIPMENT TRANSFERRED. (N.T., JACOBS, 9/12/00, PP. 476-81.)

JACOBS' PERSONAL LOAN ACCOUNT SHOWS THAT THE COMPANY'S INDEBTEDNESS TO HIM WAS REDUCED BY $79,000 FOR EQUIPMENT PURCHASED BY NGN AND TRANSFERRED TO ANOTHER MEXICAN COMPANY CALLED AMEX; THIS EQUIPMENT WAS THEN TRANSFERRED [11] TO KIMMEX'S FACILITY. (N.T., JACOBS, 9/12/00, PP. 477-78, 482; PLAINTIFF'S DAMAGE TRIAL EXHIBIT 29.)**

IN ADDITION, JACOBS' PERSONAL LOAN ACCOUNT SHOWS THAT NGN ADVANCED $122,000 OF PAYROLL COSTS FOR AMEX AND THAT JACOBS' LOAN ACCOUNT WAS REDUCED TO "REIMBURSE" NGN FOR THIS EXPENDITURE. (N.T., JACOBS, 9/12/00, PP. 477-78.)

JACOBS HAD NO CORPORATE AUTHORITY TO USE CASH FROM NGN'S CAPITAL ACCOUNT TO PAY AMEX'S PAYROLL COSTS.

FROM 1995 ONWARD, JACOBS HAD FULL ACCESS TO ALL NGN FACILITIES WHILE VIENER DID NOT. (N.T., JACOBS, 9/12/00, PP. 435, 437-38.)

FROM 1997 ONWARD, JACOBS ACTED AS THE "MANAGER" OF NGN AND RELATED ENTITIES WHILE THE FIXED ASSETS AND INVENTORY OF THE COMPANIES WERE BEING LIQUIDATED. (N.T., JACOBS, 9/12/00, PP. 438-40.)

NGN HAD ACQUIRED FIXED ASSETS CONSISTING OF MACHINERY AND EQUIPMENT WHICH HAD AN ORIGINAL ACQUISITION COST OF $4.3 MILLION AND WHICH HAD A BOOK VALUE IN EXCESS OF $2 MILLION. (N.T., JACOBS, 9/12/00, PP. 443-45.)

WHILE JACOBS "MANAGED" NGN'S LIQUIDATION AFTER JULY 1997, JACOBS SOLD $50,000 OF THIS EQUIPMENT TO A THIRD PARTY AND ACCOUNTED FOR THE PROCEEDS TO A SECURED [*363] CREDITOR, FIRST UNION. (N.T., JACOBS, [12] 9/12/00, PP. 438-40.)**

APART FROM THE $50,000 OF EQUIPMENT REPRESENTED BY THIS SECURED CREDITOR SALE AND THE ABOVE TRANSFERS TO KIMMEX THAT JOFFRED ATTEMPTED TO ACCOUNT FOR BEFORE HIS RESIGNATION, JACOBS COULD NOT EXPLAIN WHERE THE REST OF NGN'S EQUIPMENT WENT AND DID NOT ACCOUNT FOR ANY OF IT. (N.T., JACOBS, 9/12/00, P. 484.)

JACOBS CAUSED NGN TO PAY MS. VAN VU MONEY UP FRONT TO MANUFACTURE INVENTORY BEFORE IT WAS NEEDED AND TO KEEP HER FACTORIES GOING 12 MONTHS A YEAR, WHICH CAUSED TREMENDOUS CASH FLOW PROBLEMS TO NGN. (N.T., VIENER, 9/20/00, P. 699.)

WHEN THE COMPANY'S $40 MILLION SALES PROJECTIONS WERE NOT MET, JACOBS DID NOT CUT PRODUCTION; THE COMPANY WAS THEN STUCK WITH EXCESSIVE UNSOLD INVENTORY. (N.T., 9/20/00, P. 675.)

VIENER PERSISTENTLY QUESTIONED LARGE CASH PAYMENTS TO MS. VAN VU, GOING BACK TO THE MAY 1994 BOARD MEETING WHERE, DURING SAID MEETING, HE WAS ASSURED BY ROBERT FIRELY JR. THAT PAYMENTS IN CASH TO KIM NV INC. WERE OKAY SINCE THE ENTITY WAS A CORPORATION. (LIABILITY TRIAL,

PLAINTIFF'S EXHIBIT 18; N.T., 9/20/00, PP. 653, 656-57.)

JOFFRED FOUND MS. VAN VU'S RELATIONSHIP WITH JACOBS TO BE "SUSPICIOUS." (N.T., 9/20/00, P. 584.)

[13] THE COMPANY SUBSEQUENTLY PROHIBITED CASH PAYMENTS TO SUBCONTRACTORS THROUGH A POLICY ADOPTED BY PRESIDENT JOFFRED. (ADJUDICATION, SCHAEFFER, 6/30/00, FINDING OF FACT NO. 55.)**

JACOBS THEN IMPLEMENTED A SCHEME TO CONTINUE CASH PAYMENTS TO MS. VAN VU TO CIRCUMVENT THE COMPANY [*364] POLICY. (ADJUDICATION, SCHAEFFER, 6/30/00, FINDINGS OF FACT NOS. 60, 62-64.)

JACOBS PROCURED CROWN-GLOBE INC. A SUBCONTRACTOR OF NGN, THROUGH ITS PRESIDENT, DOUGLAS WOLFE, TO GENERATE INVOICES TOTALING $53,276.59 FOR "PRICE ADJUSTMENTS" TO NGN, BUT THESE ADJUSTMENTS WERE NOT OWED TO CROWN-GLOBE INC. (ADJUDICATION, SCHAEFFER, 6/30/00, FINDINGS OF FACT NOS. 56, 57, 65.)

JACOBS DIRECTED DOUGLAS WOLFE TO GIVE THE MONEY NGN PAID CROWN-GLOBE INC. FOR THESE ADJUSTMENTS BACK TO JACOBS SO HE COULD CONTINUE TO PAY CASH TO KIM VAN VU. (ADJUDICATION, SCHAEFFER, 6/30/00, FINDINGS OF FACT NOS. 62-64.)

IN JANUARY 1995, JACOBS HAD CROWN-GLOBE INC. SEND NGN ANOTHER ROUND OF BOGUS INVOICES FOR $48,135.61, IN AN ATTEMPT TO CONTINUE CASH PAYMENTS TO

MS. VAN VU. (ADJUDICATION, SCHAEFFER, 6/30/00, FINDINGS OF FACT NOS. 69-72.)

WHILE JOFFRED AND JACOBS CLAIM THE CASH PAYMENTS TO MS. VAN VU WERE [14] ULTIMATELY PROPERLY ACCOUNTED FOR, VIENER HAS NEVER BEEN SHOWN RECORDS TO SUBSTANTIATE THAT CLAIM. (N.T., 9/20/00, P. 698.)**

IT IS NOT EVEN CLEAR FROM NGN'S RECORDS THAT THE CASH PAYMENTS TO MS. VAN VU WERE FOR CHEAP TEE SHIRTS SINCE INTERNAL ACCOUNTING MEMORANDA PREPARED BY ROBERT FIRELY JR., THE COMPANY CONTROLLER, INDICATE THAT CASH PAYMENTS WERE FOR "REPAIRS" AND A "MARKER MACHINE." (N.T., 9/12/00, P. 503.)

FIRELY WAS DISCHARGED AS CONTROLLER SHORTLY AFTER HE ATTEMPTED TO RECONCILE NGN'S ACCOUNTS WITH NV SPORTSWEAR. (N.T., 9/12/00, PP. 502, 506.)

[*365]

NGN'S ACCOUNTING FIRM, BEARD & COMPANY, ACCEPTED THE COMPANY'S PURPORTED "RECONCILIATION" OF THE CHEAP TEE PROGRAM ONLY AFTER ALL OWNERS, EXCEPT VIENER, WARRANTED AND REPRESENTED IN WRITING THAT THE RECONCILIATION WAS ACCURATE. (N.T., JOFFRED, 9/20/00, P. 620.)

VIENER WAS AFFORDED AN OPPORTUNITY TO REVIEW NGN RECORDS SOLELY TO DEPRIVE HIM OF ANY CLAIM IN THIS

LITIGATION THAT HE WAS DEPRIVED OF ACCESS. (N.T., JOFFRED, 9/20/00, P. 636.)

NGN GAVE JACOBS THE RESPONSIBILITY TO LOCATE OFF-SHORE FACILITIES FOR NGN.

JACOBS, ACCOMPANIED BY MS. VAN VU, TRAVELED TO MEXICO AND OTHER COUNTRIES AT NGN'S [15] EXPENSE.**

WHEN JACOBS LOCATED AN ACCEPTABLE OFF-SHORE FACILITY IN MEXICO, HE ACQUIRED IT FOR KIMMEX, AN ENTITY OWNED BY HIMSELF AND MS. VAN VU.

JACOBS NEVER GAVE VIENER THE OPPORTUNITY TO INVEST IN THE OFF-SHORE SITE.

JACOBS NEVER REIMBURSED NGN FOR THE COSTS OF JACOBS' AND MS. VAN VU'S TRAVELS AS MENTIONED ABOVE.

JACOBS' SUBORDINATION OF HIS FIDUCIARY DUTY TO HIS RELATIONSHIP WITH MS. VAN VU CONTINUED AFTER THE FREEZE-OUT UP TO THE PRESENT.

JACOBS HAS NEVER EXPRESSED REMORSE OR CONTRITION FOR HIS BAD ACTS AND HAS MADE NO EFFORT TO MAKE AMENDS FOR THEM.

JACOBS HAS RESPONDED TO THE COURT'S FINDINGS OF LIABILITY WITH AN ACCELERATING COURSE OF EGREGIOUS CONDUCT.

[*366] *Punitive Damages*

Extent of Victim Viener's Harm

A PRINCIPAL HARM CAUSED BY THE MISCONDUCT OF JACOBS WAS THE

DESTRUCTION OF THE TOTAL VALUE OF VIENER'S OWNERSHIP INTERESTS IN NGN AND RELATED ENTITIES.

VIENER'S INTERESTS IN THOSE ENTITIES, FAIRLY VALUED, AND APPLYING THE MINORITY DISCOUNT, WAS $1.2 MILLION AS OF DECEMBER 31, 1994. (N.T., WILUSZ, 9/7/00, P. 180.)

THE ONGOING COURSE OF MISCONDUCT BY JACOBS SUBSTANTIALLY CAUSED AND CONTRIBUTED TO THE COMPLETE DESTRUCTION [16] OF AN APPAREL BUSINESS WHICH, THROUGH SUCCESSIVE GENERATIONS AND SUCCESSOR CORPORATIONS, HAD INVOLVED VIENER AND OTHER FAMILY MEMBERS FOR OVER 50 YEARS.**

VIENER AND EACH OF HIS PARTNERS, JACOBS AND RUSH, RECEIVED SUBSTANTIAL SHAREHOLDER DISTRIBUTIONS AND INCOME FROM THEIR APPAREL BUSINESS, EXCEEDING $1 MILLION TO EACH OF THEM IN THE COMPANY'S BEST YEAR. (N.T., BARNEY, 9/7/00, PP. 69-72; PLAINTIFF'S DAMAGE TRIAL EXHIBIT 5.)

WHEN VIENER WAS TERMINATED, THE BUSINESS HAD A SUBSTANTIAL STOCK OF EQUIPMENT AND FIXED ASSETS ($2,458,443--DEPRECIATED BOOK VALUE) AND SUBSTANTIAL QUANTITIES OF INVENTORY ($6,411,105) ON HAND. (PLAINTIFF'S DAMAGE EXHIBITS 20, PP. 4, 28.)

BY 1997, THE VALUE OF THE COMPANY'S INVENTORY HAD INCREASED TO $6,429,000. (TRIAL EXHIBIT 8.)

JACOBS HAD CUSTODY AND CONTROL OF THE COMPANIES' PLANT FROM ITS CLOSING IN 1997 UNTIL HE WAS REMOVED AND A RECEIVER APPOINTED BY THIS COURT ON AUGUST 8, 1999; VIENER WAS COMPLETELY EXCLUDED FROM ACCESS TO THE FACILITY EXCEPT DURING REGULAR BUSINESS HOURS WHEN IT WAS [*367] OTHERWISE OPEN, UNTIL 2000. (N.T., 9/12/00, PP. 435, 437-38.)

VIENER'S INTEREST IN NGN AND THE RELATED ENTITIES WAS, IN SUBSTANCE, [17] HIS CAREER AND THE CULMINATION OF HIS LIFE'S WORK.**

AT 61 YEARS OF AGE, VIENER IS TOO OLD TO START A CAREER IN TEXTILES; HE NOW SELLS OFF-PRICE, REJECTED, AND OTHER DISTRESS APPAREL AND EARNS $15,000 A YEAR FROM SELF-EMPLOYMENT. (N.T., 9/8/00, PP. 277-78.)

THE SHAREHOLDERS MAINTAINED $3 MILLION OF WHOLE LIFE INSURANCE ON EACH OTHER'S LIVES TO PROTECT THEIR OWNERSHIP INTERESTS IN THE BUSINESS IF ONE OF THEM DIED. (N.T., 9/8/00, PP. 279-80.)

THE MAJORITY SHAREHOLDERS, WITHOUT JUSTIFICATION AND IN BAD FAITH, REFUSED TO TRANSFER OWNERSHIP OF ANY OF THOSE POLICIES TO VIENER OR PERMIT HIM TO NAME HIS FAMILY MEMBERS AS BENEFICIARIES. (N.T., 9/8/00, P. 279.)

AS A RESULT, VIENER WAS REQUIRED TO APPLY TO THE COURT FOR SPECIAL RELIEF TO HAVE ONE OF THESE POLICIES TRANSFERRED TO HIM SO HE COULD PAY THE PREMIUMS TO

MAINTAIN THIS POLICY AND NAME HIS FAMILY AS BENEFICIARIES. (N.T., 9/8/00, P. 279.)

AFTER VIENER WAS FROZEN OUT, HE COULD NO LONGER AFFORD TO CARRY THIS AMOUNT OF COVERAGE AND IT WAS CONVERTED TO A $200,000 POLICY OF TERM LIFE. (N.T., 9/8/00, PP. 279-80.)

VIENER ALSO LOANED NGN $140,000.

NGN SUBSEQUENTLY FILED A CHAPTER 7 BANKRUPTCY.

[18] VIENER'S INDEBTEDNESS WILL BE UNCOLLECTIBLE AS THERE ARE NO ASSETS FOR THE TRUSTEE TO ADMINISTER AND NOTHING WILL BE AVAILABLE FOR GENERAL CREDITORS.**

[*368]

AS A RESULT OF THE FREEZE-OUT, VIENER HAS INCURRED COUNSEL FEES IN THE AMOUNT OF $240,000. (N.T. 9/20/00, PP. 714-18, 724; PLAINTIFF'S DAMAGE TRIAL EXHIBIT 38.)

Punitive Damages

Wealth of Tort-feasor Jacobs

JACOBS SUBMITTED A PERSONAL FINANCIAL STATEMENT TO THE COURT WHICH PURPORTED TO SHOW THAT HE HAD NEGLIGIBLE ASSETS AND NEARLY $2.3 MILLION DOLLARS OF DEBT. (DEFENDANT'S DAMAGE TRIAL EXHIBIT 5.)

JACOBS CLAIMS THAT THE ONLY ASSETS HE HOLDS INDIVIDUALLY ARE WORTH $500. (N.T., 9/8/00, P. 344.)

THIS FINANCIAL STATEMENT IS FALSE IN MANY RESPECTS, AND, WHEN TAKEN AS A

WHOLE, MATERIALLY MISLEADING; IT OMITTED CRITICAL INFORMATION REGARDING HIS OWNERSHIP INTERESTS IN BANK ACCOUNTS AND INVESTMENT ACCOUNTS AND GREATLY EXAGGERATED HIS OBLIGATIONS.

JACOBS ENTERED THIS EXHIBIT TO CONVEY THE IMPRESSION THAT HE IS PENNILESS AND DEEPLY IN DEBT.

JACOBS FAILED TO PRODUCE ANY OF THE FINANCIAL DOCUMENTS REQUESTED IN THE NOTICE TO ATTEND AND PRODUCE DOCUMENTS THAT HE RECEIVED FOR THE DAMAGES [19] PHASE OF THE TRIAL. (N.T., 9/8/00, PP. 364-65, 369.)**

JACOBS TESTIFIED THAT HE HAS NO INCOME AND OMITTED CRITICAL INFORMATION ABOUT HIS SOURCES OF INCOME, ACCESS TO BANK ACCOUNTS, CASH AND OTHER RESOURCES.

JACOBS CLAIMED HE HAD NO VEHICLE OTHER THAN A 1992 PLYMOUTH VOYAGER WORTH $500. (DEFENDANT'S DAMAGE TRIAL EXHIBIT 5.)

[*369]

IN FACT, JACOBS DRIVES A 1995 LEXUS ON PERMANENT LOAN TO HIM FROM NV SPORTSWEAR, MS. VAN VU'S COMPANY. (N.T., JACOBS, 9/12/00, P. 507.)

JACOBS HAS ACCESS TO AND CAN DRAW UPON AT LEAST THREE BANK ACCOUNTS TITLED IN THE NAME OF VARIOUS BUSINESSES HE IS INTERESTED IN. (N.T., JACOBS, 9/8/00, PP. 368-71.)

JACOBS CAN DRAW MONIES FROM TWO KIMMEX BANK ACCOUNTS WHICH ARE IN HIS NAME--ONE AT ROYAL BANK IN READING, PENNSYLVANIA AND ANOTHER IN TEXAS. (N.T., JACOBS, 9/12/00, P. 384.)

JACOBS PAYS ALL OF HIS CREDIT CARD BILLS OUT OF THIS KIMMEX ACCOUNT. (N.T., JACOBS, 9/8/00, P. 377.)

FROM JULY 30, 2000, AFTER THE COURT MADE ITS LIABILITY FINDINGS, TO SEPTEMBER 2000, BEFORE THE INCEPTION OF THE DAMAGES PHASE OF THIS TRIAL, JACOBS WITHDREW $59,000 FROM THE ROYAL BANK ACCOUNT. (N.T., JACOBS, 9/12/00, PP. 388-89.)

[20] JACOBS ALSO HAS AN ACCOUNT AT ROYAL BANK IN THE NAME OF NFW, A COMPANY WHICH OWNS REAL ESTATE ON WHICH A LOCAL RESTAURANT CALLED THE MAD HATTER OPERATES; HE CAN ALSO DRAW ON THAT ACCOUNT. (N.T., P. 370.)**

JACOBS ALSO HAS A BANK ACCOUNT AT ROYAL BANK IN THE NAME OF NKM WHICH OWNS THE LAND AND IMPROVEMENTS WHICH HILLCREST RACQUET CLUB OPERATES, WHICH HE AND MS. VAN VU FOUNDED; THE HILLCREST CLUB EMPLOYS JACOBS' SON, WHO MANAGES IT. (N.T., PP. 370, 390.)

THE HILLCREST ACCOUNT HAS $80,000 IN IT. (N.T., P. 392.)

JACOBS AND MS. VAN VU EACH HAD AN INTEREST IN 49.5 PERCENT OF NKM WHICH IS A LIMITED PARTNERSHIP. (N.T., P. 116.)

[*370]

IN ORDER TO SECURE THE MORTGAGE TO FUND THE ACQUISITION AND CONSTRUCTION OF HILLCREST, JACOBS AND MS. VAN VU PLACED A CERTIFICATE OF DEPOSIT WORTH $140,000 AT ROYAL BANK. (N.T., PP. 390-91.)

JACOBS' CAPITAL ACCOUNT IN NKM WAS $172,000 AS OF DECEMBER 31, 1999. (N.T., MEYER WEINER, 9/7/00, P. 121; PLAINTIFF'S DAMAGE TRIAL EXHIBIT 13.)

NKM RECEIVED RENTAL PAYMENTS FROM HILLCREST IN THE AMOUNT OF $13,000 PER MONTH; NKM'S BALANCE SHEET SHOWS TOTAL ASSETS OF $1.5 MILLION. (N.T., MEYER WEINER, 9/7/00, P. 121.)

[21] HILLCREST, THE OPERATING ENTITY, HAD TOTAL RECEIPTS OF $438,000 IN 1998. (PLAINTIFF'S DAMAGE TRIAL EXHIBIT 6.)**

HILLCREST OBTAINED SUBSTANTIAL ADDITIONAL LOANS FROM A LOCAL BANK IN THE SUMMER OF 2000 TO FUND FURTHER IMPROVEMENTS/EXPANSION OF THE RACQUET CLUB. (N.T., JACOBS, 9/12/00, PP. 520-22.)

JACOBS PERSONALLY GUARANTEED THE NEW HILLCREST LOAN AND PLEDGED HIS ACCOUNTS INVESTED BY TOM WEIK, WHICH ARE WORTH $450,000 AS COLLATERAL. (N.T., PP. 521-22.)

IN ORDER TO OBTAIN THE LOAN, JACOBS PROVIDED A FINANCIAL STATEMENT TO THE LENDER THAT HE ADMITS WAS "DIFFERENT" FROM THE ONE HE PROVIDED TO THIS COURT. (N.T., P. 522.)

WRITTEN EVIDENCE WAS PRODUCED WHICH PURPORTED TO SHOW THAT JACOBS

HAD TRANSFERRED HIS OWNERSHIP IN NKM TO MS. VAN VU, IN A RECENT TRANSACTION, FOR $90,000; $30,000 OF THE PURCHASE PRICE WAS REPRESENTED BY FORGIVENESS OF AN ALLEGED DEBT OWED TO MS. VAN VU AND $60,000 ALLEGEDLY PAID BY MS. VAN VU TO JACOBS. (PLAINTIFF'S DAMAGE TRIAL EXHIBIT 19.)

[*371]

NO PRE-EXISTING DEBT TO MS. VAN VU EXISTED.

MOREOVER, JACOBS IMMEDIATELY ENDORSED THE CHECKS PAID BY MS. VAN VU, TOTALING $60,000, BACK TO HER; JACOBS RECEIVED NOTHING OF [22] VALUE FOR HIS INTERESTS IN THE REAL ESTATE, IMPROVEMENTS AND LIQUID ASSETS OWNED BY NKM. (N.T., JACOBS, 9/12/00, PP. 528-30.)**

JACOBS NEVER ADVISED HIS ACCOUNTANT THAT HE HAD "SOLD" HIS INTEREST IN NKM TO MS. VAN VU UNTIL AUGUST 28, 2000, IMMEDIATELY BEFORE THE DAMAGE PHASE OF THIS TRIAL WAS TO BEGIN. (N.T., MEYER WEINER, 9/7/00, P. 118.) IN FACT, THE CONVEYANCE WAS A FRAUDULENT CONVEYANCE MADE FOR THE PURPOSE OF PUTTING THESE ASSETS BEYOND THE REACH OF HIS CREDITORS, INCLUDING THE PLAINTIFF.

JACOBS ALSO CLAIMS TO HAVE TRANSFERRED HIS ONE-HALF OWNERSHIP INTEREST IN HILLCREST RACQUET CLUB TO HIS SON, MATT, IN AUGUST 1995, FOR NO CONSIDERATION; HE NEVER TOLD HIS

ACCOUNTANT THAT HE HAD MADE THIS GIFT OR REPORTED IT TO THE IRS. (N.T., PP. 98-102.)

JACOBS' TAX RETURNS AFTER 1995 IMPUTE HILLCREST EARNINGS AND LOSS TO JACOBS AND HIS WIFE. (N.T., P. 103.)

JACOBS DID NOT IN FACT TRANSFER HIS INTEREST IN HILLCREST RACQUET CLUB TO HIS SON OR ANYONE ELSE IN 1995 OR AT ANY OTHER TIME.

JACOBS HAS NOT DISCLOSED ANY INFORMATION TO HIS ACCOUNTANT REGARDING HIS INCOME AND EXPENSES FOR 1999; AND EXTENSION FOR HIS PERSONAL TAX RETURN OF 1999 WAS OBTAINED UNTIL OCTOBER [23] 15, AFTER THE DATE OF THE DAMAGES PHASE OF THIS TRIAL. (N.T., MEYER WEINER, 9/7/00, P. 134.)**

JACOBS IS ENTITLED TO RECEIVE $225,000 IN TAX REFUNDS ON ACCOUNT OF THE FAILURE OF NGN; BUT JACOBS FAILED TO DISCLOSE HIS ENTITLEMENT TO THESE REFUNDS AS AN ASSET ON [*372] THE FINANCIAL STATEMENT HE PROVIDED TO THE COURT. (N.T., P. 134; DEFENDANT'S DAMAGE TRIAL EXHIBIT 5.)

JACOBS EARNED SUBSTANTIAL INCOME FOLLOWING THE COLLAPSE OF NGN THAT HE DID NOT VOLUNTARILY DISCLOSE: IN 1995, HE EARNED $156,000 FROM NGN, $46,500 IN INTEREST, $86,100 IN DIVIDENDS AND HAD A $43,000 CAPITAL GAIN; HE PAID NO INCOME TAX BECAUSE OF NGN LOSSES; JACOBS' WIFE NETS ABOUT $40,000 AS A SCHOOLTEACHER.

(PLAINTIFF'S DAMAGES TRIAL EXHIBIT 15; N.T., JACOBS, 9/12/00, P. 422.)

JACOBS RECEIVED $180,000 FROM NV SPORTSWEAR AND KIMMEX IN 1997. (N.T., MEYER WEINER, 9/7/00, P. 142.)

ALTHOUGH JACOBS' FINANCIAL STATEMENT SHOWS KIMMEX TO BE WORTHLESS, HE CLAIMS TO HAVE SUPPLIED OVER $200,000 WORTH OF EQUIPMENT, THAT HE CLAIMS TO OWN PERSONALLY, TO KIMMEX. (ADJUDICATION, SCHAEFFER, 6/30/00, FINDINGS OF FACT NOS. 95-100.)

JACOBS REFUSED TO SAY THAT HE HAD EVER SEEN KIMMEX'S BOOKS, WHICH [24] HE CLAIMS MS. VAN VU KEEPS IN MEXICO. (N.T., JACOBS, 9/12/00, PP. 448-49, 535.)**

DESPITE THIS, JACOBS ADMITS KIMMEX HAD ESTIMATED GROSS SALES OF AT LEAST $700,000 IN 1998 AND 1999. (N.T., PP. 449-52.)

ALTHOUGH KIMMEX IS A SUBCHAPTER S CORPORATION ORGANIZED IN PENNSYLVANIA, IT HAS NOT FILED STATE OR FEDERAL TAX RETURNS; KIMMEX NEVER PROVIDED JACOBS WITH A K-1 SHOWING HIS SHARE OF THE PROFITS AS AN OWNER OF KIMMEX. (N.T., JACOBS, 9/12/00, PP. 448-54.)

JACOBS TAX RETURNS FOR 1996 AND 1997 ARE INACCURATE.

BECAUSE KIMMEX RECORDS ARE IN MEXICO AND JACOBS HAS NOT BEEN FORTHCOMING ABOUT HIS INVOLVEMENT [*373] WITH NV SPORTSWEAR, THE COURT DOES NOT HAVE COMPLETE OR ACCURATE

INFORMATION REGARDING JACOBS' NET WORTH.

JACOBS FAILED TO HONOR THE SUBPOENA DUCES TECUM SERVED UPON HIM BY NOT BRINGING THE STATEMENTS, FOR THE PERIOD OF JANUARY 1, 1998 TO THE PRESENT, OF ALL BANK OR FINANCIAL ACCOUNTS ON WHICH HE IS NAMED, DATED WITHIN THE LAST YEAR, INCLUDING, BUT NOT LIMITED TO, CHECKING ACCOUNT STATEMENTS, SAVINGS ACCOUNT STATEMENTS, CERTIFICATES OF DEPOSIT, MONEY MARKET ACCOUNTS, STATEMENTS OR OTHER DOCUMENTS WHICH SHOW HIS OWNERSHIP INTEREST IN STOCKS, BONDS, [25] MUTUAL FUNDS, BROKERAGE ACCOUNTS OR OTHER SIMILAR ACCOUNTS AND/OR INVESTMENTS. (N.T., JACOBS, 9/8/00, P. 365.)**

JACOBS HAS WILLFULLY CONCEALED THE NATURE AND EXTENT OF HIS INTEREST AND INVOLVEMENT IN NV AND KIMMEX.

JACOBS ALSO FAILED TO DISCLOSE HIS OWNERSHIP INTERESTS IN SEVERAL SIGNIFICANT BROKERAGE ACCOUNTS MANAGED BY TOM WIEK.

JACOBS AND HIS WIFE HAD A COMBINED NET WORTH OF $4 MILLION IN 1993. (N.T., WEIK, 9/7/00, P. 30.)

JACOBS AND HIS WIFE OWN AN ACCOUNT INVESTED WITH INVESTORS TRUST WHICH HAS A VALUE OF $159,000 AND AN ACCOUNT WITH PENN SECURITY HAVING A VALUE OF $337,600. (N.T., PP. 33-34.)

JACOBS OWNS A ROLLOVER IRA WHICH HAS $955,614 IN IT THAT MR. WEIK MANAGES FOR HIM. (N.T., P. 42.)

JACOBS AND HIS WIFE HAVE PURCHASED INVESTMENTS MANAGED BY H & P MANAGEMENT LLP AND REPUBLIC BANK OF KOREA FOR APPROXIMATELY $160,000 (N.T., PP. 33-34.)

[*374]

JACOBS ALSO HAS A ROLLOVER IRA INVESTED BY SHEARSON WHICH HAS A VALUE OF APPROXIMATELY $80,000. (N.T., P. 402.)

JACOBS FAILED TO DISCLOSE THAT HE HOLDS A MORTGAGE ON THE PROPERTY OWNED BY GRESHVILLE REALTY IN THE AMOUNT OF $135,000 WHICH GENERATES AN INCOME OF $2,000 PER [26] MONTH. (N.T., JACOBS, 9/12/00, PP. 410-11.)**

JACOBS FIRST CLAIMED THE MONTHLY PAYMENTS ON THE GRESHVILLE MORTGAGE WERE USED TO PAY THE MORTGAGE ON JACOBS' RESIDENCE; JACOBS LATER CHANGED HIS POSITION AND CLAIMED OTHER FUNDS FROM GRESHVILLE INN WERE USED TO PAY HIS HOME MORTGAGE. (N.T., PP. 410-13.)

JACOBS ACKNOWLEDGED HE AND HIS WIFE ADVANCED $300,000 OF THEIR OWN ASSETS TO ACQUIRE THE GRESHVILLE INN, ITS LIQUOR LICENSE AND TO IMPROVE THE FACILITY. (N.T., PP. 508-509.)

WHILE JACOBS CLAIMS TO HAVE "ASSIGNED" ALL OF HIS INTERESTS IN THE GRESHVILLE INN TO HIS WIFE AS SECURITY FOR REPAYMENT OF THE PURCHASE, HE

PROVIDED NO EXTRINSIC EVIDENCE, SUCH AS AN ASSIGNMENT OF MORTGAGE PAYMENTS, TO CORROBORATE THAT CLAIM.

JACOBS DID NOT ASSIGN SAID INTERESTS TO HIS WIFE OR ANYONE ELSE.

IN 1997, JACOBS ACQUIRED ALL OF THE SHARES OF NFW CORP., WHICH OWNS THE BUILDING WHERE THE MAD HATTER RESTAURANT AND SEVERAL APARTMENTS ARE LOCATED, FROM THE CO-OWNERS, THE MONTEITHS, AND FORGAVE CERTAIN INDEBTEDNESS OWED TO HIM IN EXCHANGE FOR THESE INTERESTS. (N.T., P. 513.)

ALTHOUGH JACOBS CLAIMS TO HAVE GIFTED THE MAD HATTER TO HIS SON, MATT, IN 1997, HE OFFERED NO EXTRINSIC [27] EVIDENCE TO CORROBORATE THAT CLAIM; THERE IS NO EVIDENCE [*375] THAT SUCH A GIFT WAS REPORTED TO THE IRS OR A GIFT TAX PAID; THERE IS ALSO NO EVIDENCE IN THE TAX RETURNS VEINER PROVIDED THAT SUCH A GIFT OCCURRED. (N.T., P. 513.) IN FACT, JACOBS DID NOT GIFT THE MAD HATTER TO HIS SON.**

JACOBS INVESTED $90,000 IN IMPROVING THE BUILDING WHERE THE MAD HATTER IS LOCATED; FROM APARTMENT AND RESTAURANT RENTALS, NFW GENERATES RENTALS OF APPROXIMATELY $2,400 PER MONTH. (N.T., PP. 514, 516.)

JACOBS VALUED THE GRESHVILLE PROPERTY AND THE MAD HATTER PROPERTY AT ZERO ON HIS PERSONAL FINANCIAL STATEMENT.

WHEN JACOBS IS NOT "SQUATTING" AT MS. VAN VU'S HOUSE IN CALIFORNIA, HE AND HIS WIFE RESIDE IN A BERKS COUNTY RESIDENCE LAST VALUED AT $650,000 IN 1997 AND OWNED BY THEM AS TENANTS BY THE ENTIRETIES. (N.T., P. 419.)

JACOBS CLAIMED TO OWE FRANK MCCULLOUGH (THE PURCHASER OF THE FIRST UNION SECURED DEBT) $1.3 MILLION ON HIS PERSONAL FINANCIAL STATEMENT WHEN JACOBS KNEW THAT MCCULLOUGH HAD OFFERED TO SETTLE WITH HIM FOR BETWEEN $125,000 AND $150,000 AND THAT MCCULLOUGH "WOULD BE HAPPY WITH" A NUMBER IN THAT RANGE. (N.T., PP. 432-33.)

JACOBS CLAIMED TO OWE [28] BANK OF NEW YORK $375,000 OR MORE WHEN HE KNEW THAT ONE OF HIS CO-PARTNERS, ALLEN FRIEDMAN, WOULD BE REQUIRED TO PAY THAT DEBT. (N.T., PP. 495-97.) SAID DEBT HAS NOW BEEN PAID. (PLAINTIFF'S EXHIBIT 43A.)**

JACOBS OWES $163,773.19 FOR LEGAL FEES AND DISBURSEMENTS ARISING OUT OF THE LITIGATION OVER THE BANK OF NEW YORK DEBT, JOINTLY AND SEVERALLY, WITH ALLEN FRIEDMAN AND RIKI FRIEDMAN. (DEFENDANT'S EXHIBIT 16.)

[*376]

JACOBS' CONTINUED REFUSAL TO ADMIT OR ACKNOWLEDGE SATISFACTION OF THE BANK OF NEW YORK OBLIGATION FORCED PLAINTIFF TO CONDUCT A DEPOSITION BY WRITTEN INTERROGATORIES OF FRIEDMAN WHERE HE CONFIRMED SATISFACTION OF

THAT DEBT AND PAYMENT OF COUNSEL FEES; THE TOTAL PAYMENT BY FRIEDMAN WAS $420,000. (PLAINTIFF'S DAMAGE TRIAL EXHIBIT 39, PP. 4-5.)

JACOBS' STATEMENT OF ASSETS AND LIABILITIES FAILS TO ACKNOWLEDGE THAT HE BREACHED HIS DUTIES TO VIENER OR ACCEPT RESPONSIBILITY TO PAY ANYTHING TO VIENER. JACOBS DOES NOT ACKNOWLEDGE EVEN THE EXISTENCE OF AN UNLIQUIDATED DEBT TO VIENER.

III. DISCUSSION

Compensatory Damages

We have found that, in the winter of 1995, the majority shareholders, Jacobs and Rush, froze minority shareholder Viener out of [**29] the Subchapter S corporations that Viener had co-founded and breached their fiduciary duty to protect his interests. We find that the appropriate valuation date to determine Viener's interest in NGN and RGC is December 31, 1994 for the following reasons:

Viener was terminated as an officer of NGN and related companies on February 3, 1995;

After February 3, 1995, Viener had no meaningful role in the management and direction of NGN and its related companies;

After Viener's termination, company officers made a series of critical decisions which contributed to the failure of the business and in which Viener did not have [*377] meaningful participation, including: (1) a determination to borrow substantial additional monies from local banks; (2) the adoption of annual business plans which called for sales substantially in excess of the company's past experience--plans which were never adjusted to changing market conditions; (3) the adoption of inventory practices,

including but not limited to the manufacture by Ms. Van Vu and stockpiling of substantial quantities of inventory months in advance of sales; (4) the build-up of an excessive $7 million in inventory; (5) [**30] ceasing to take orders for sales of garments; (6) agreeing that an off-shore subsidiary was important to NGN's future success, but permitting said facility to be set up as owned by Jacobs and Van Vu; (7) electing to close the company's doors despite the fact that the company remained viable."

All of the foregoing had substantial negative impact on NGN's prospects. Viener objected strenuously to all these decisions.

NGN and its subsidiaries were viable entities in 1997 and could have continued had they been well managed. Many other textile companies survived because they were well managed during these times of changing economic conditions in the apparel industry. But Jacobs' problems with the management of the company's production function and his increasing involvement in pursuing his self interests, including, but not limited to setting up a Mexican manufacturing concern for himself and Ms. Van Vu, resulted in his removal as head of production. Rush and Friedman's performances in sales after Viener's removal were a waste of time and money to the company.

Shares of NGN and its related entities are not readily marketable and represent illiquid investments. After [*378] Viener [**31] was frozen out, he could not market his ownership interest in NGN to persons other than the majority shareholders for a price reasonably near its actual value. Viener, therefore, was effectively compelled to retain his ownership interests in these companies while decisions being made and actions being taken by others effectively destroyed the value of his investment. We find that the use of a valuation date following Viener's discharge would allow Jacobs to profit from his self-serving conduct.

What remains to be determined is valuation of Viener's interests in NGN and RGC as of December 31, 1994. Defendant proposes that Viener should be paid book value over five years, pursuant to the shareholder agreement, as of 1996. (Jacobs' proposed findings of fact and conclusions of law, nos. 126-27, 130-32.) We disagree.

On August 27, 1990, the parties had entered into a written shareholder agreement which guaranteed each shareholder that he could sell his shares at the then current book value of the companies. In February and March 1995, immediately after they fired Viener and froze him out, the majority shareholders offered to buy Viener out at book value over five years. Viener refused [**32] to sell his shares for book value because this did not represent the fair value of his interest. The shareholders had considered the fair value of their interests to be two times the book net worth.

"When a contract fails to provide for a specific contingency, it is silent, not ambiguous." *Seven Springs Farm Inc. v. Croker*, 748 A.2d 740, 744 (Pa. Super. 2000). (citation omitted) When unambiguous, the court must interpret its meaning solely from the contents within its [*379] four corners, consistent with its plainly expressed intent. *Id.* The agreement entered into by Viener, Jacobs and Rush covered:

> a shareholder's transfer, pledge, or sale of his shares in the event of his voluntary resignation, and the right of first offer to the other shareholders;
>
> purchase by the other shareholders in the event of the disability of a shareholder; or
>
> the purchase of shares in the event of the death of any shareholder."

The agreement does not address involuntary termination of a shareholder's employment and/or his

removal as a director. The primary purpose of the agreement is to provide for continuity in the management of the business and affairs of the [**33] corporations by restricting the sale or transfer of stock by individual shareholders. The parties to the agreement either intended to exclude the sale of the shares upon termination of employment or did not anticipate or consider such an event, which is the more likely scenario. The parties in this case are not unsophisticated; they are familiar with corporate formalities and had legal advice in drafting the agreement. We find that the agreement is clear and unambiguous and shall be strictly construed. The silence of the agreement regarding these circumstances is conspicuous; they are not expressly listed events. We find, therefore, that the agreement does not apply to the factual scenario presented by this case.

We will order defendant Jacobs to pay Viener the fair value of Viener's interests in NGN and RGC as of December 31, 1994. In *O'Connor Appeal*, 452 Pa. 287, 304 A.2d 694 (1973), our Supreme Court explained that in [*380] determining the fair value of a minority holder's stock, "consideration must be given to all factors and elements which reasonably might enter into the fixing of value." *Id.* at 292, 304 A.2d at 698. The Supreme Court instructed [**34] that "fair value" is determined based upon the value of the shares on a going concern basis to arrive at the true or intrinsic value. *Id.* at 292, 304 A.2d at 697-98. In the actual judicial determination of intrinsic value, various factors have been distilled into three principal methods of valuation which have variably been used, commonly in combination with each other: (1) net asset value; (2) actual market value; and (3) investment value. *Id.* However, the court is not limited to a consideration of only these three valuation methods. *In re Glosser Brothers Inc.*, 382 Pa. Super. 177, 186, 555 A.2d 129, 133 (1989).

In *O'Connor*, the Supreme Court found that although market value may generally be relevant, the market value of the stock in that case had no application whatsoever because the company was a closely-held corporation having unlisted stock and therefore no public market. *Id.* at 292 n.6, 304 A.2d at 698 n.6. Such is the case sub judice and under the facts presented, market value has no relevance and we shall not consider it.

Defendant has not offered any expert testimony on the valuation of Viener's interests. Plaintiff offered the [**35] expert testimony of Edward Wilusz, a certified financial analyst and the president of Value Management Inc., a consulting firm specializing in business valuations. Mr. Wilusz has been involved in the valuation business since 1980 and currently does about 200 appraisals a year for tax related purposes, employee stock ownership plans, litigation support and to provide assistance to buyers and [*381] sellers of businesses and business interests. Most of his work has been in the area of closely-held corporations. We accepted Mr. Wilusz as an expert in valuing business interests and we accord his opinion substantial weight.

Mr. Wilusz reviewed, inter alia, tax returns for NGN for the years 1990 through 1994, the August 27, 1990 shareholder agreement, and NGN and RGC's combined financial statement for 1994. His appraisal process was broken into three separate stages: (1) data gathering on the company itself, looking at what is going on in the industry and industry expectations and then making a comparison; (2) taking all of that information for the company and the industry and making some sense of it; and (3) applying three various approaches to value: asset value (assets minus liabilities), [**36] comparative company or guideline company approach (which looks at companies with similar investment characteristics as the subject company), and the present value of future earnings approach.

Under the asset value approach, the company had a value of $3.6 million as of December 31, 1994. This approach is given little weight unless a liquidation is anticipated or expected in the not too distant future.

Under the comparative company or guideline company approach, the expert examined 85 apparel companies and narrowed it down to 10 that shared similar investment characteristics with NGN. He then examined their performances, compared these to the subject company and arrived at a multiple that was applied to the subject company. He looked at price-to-average earning multiples with pricings to a five-year average multiple. The price-to-average earning multiple of the guideline companies was relatively high, 25 times. The expert applied a low [*382] multiple of nine times to the subject companies' earnings. The price-to-earnings multiple was 17 times for the guideline companies; he used an evaluation multiple of 13 times for the subject company in that case. The valuation under this [**37] approach was $6 million.

Under the last approach, present value of future earnings, Wilusz first looked at the past average earnings of the company to get an idea of the future. The number he then used was over 50 percent less than what the majority shareholders said they were going to achieve in 1995. Then he brought this number back to present value by taking into account the risk that the company would not do a little more than half as well as management expected. This was done by applying a discount rate of 21 percent to arrive at a valuation conclusion of $5.5 million. A one-third interest is $1.835 million.

Further applying a minority shareholder's discount of 35 percent to this figure, the expert opined, with a reasonable degree of professional certainty, that the value of Viener's interest in the subject company, as of December 31, 1994 came to $1.2 million.

We find that the present value of future earnings approach is the most reliable method to assess the fair value of Viener's interests. We hold, therefore, that the fair value of Viener's interests in NGN and RGC as of December 31, 1994 is $1.2 million and we shall award him said amount.

Punitive Damages

In [**38] our adjudication of June 30, 2000, we found that Jacobs' conduct was outrageous and this finding makes him liable for punitive damages.

[*383] The Supreme Court of Pennsylvania adopted section 908(2) of the Restatement (Second) of Torts in *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984). Section 908(1) states that punitive damages are damages "awarded against a person to punish him for his outrageous conduct." Punitive damages need not be proportional to compensatory damages. In assessing punitive damages, the trier of fact may consider the character of the tort-feasor's act, the nature and extent of his victim's harm, and the wealth of the tort-feasor. *Kirkbride v. Lisbon Contractors Inc.*, 521 Pa. 97, 100, 555 A.2d 800, 802 (1989). It is for the fact-finder to weigh these factors in arriving at an appropriate punitive damage award.

We must weight the conduct of the tort-feasor against the amount of damages which would deter such future conduct. In performing this duty, we must weigh the intended harm against the tort-feasor's wealth. *Id.* at 102, 555 A.2d at 803.

Jacobs breached his fiduciary duty of loyalty and fairness [**39] to minority shareholder Viener. He promoted his self-interests with his business associate, Ms. Van Vu, at the expense of the minority shareholder. He misused his power by promoting his personal interests at the expense of the corporate interests by, inter alia, creating fraudulent schemes to circumvent company policy.

This conduct is wantonly tortious, despite the fact that the books were later "reconciled" to justify it. Jacobs cannot explain the loss of significant amounts of NGN equipment even though he "managed" NGN's liquidation.

He reduced the company's working capital, at a time when it was short on cash, to pursue his own interests in Mexico. He converted NGN's equipment. Jacobs failed [*384] to use his best efforts to procure the continued existence of NGN. All of this came at the expense of NGN and of Viener, whose own interest in the company became worthless after Jacobs' failure to protect it. Viener has been denied his proper share of the benefits accruing from the company.

There are few remedies available for minority shareholders in closely-held corporations under these circumstances. They are particularly vulnerable to the majority who can destroy their interests [**40] with impunity by trying to hide behind the business judgment rule. Such harm must be punished and, thus, deterred. We will impose punitive damages in a reasonable amount to punish Jacobs for his self-dealing and outrageous conduct which was a breach of his duty of loyalty to Viener. Furthermore, Jacobs has deliberately misrepresented his net worth to this court. In fact, Jacobs thumbed his nose at the court with his testimony. He testified that he had an old automobile worth $500 and nothing more. He testified that his daily living expenses were paid by his associate, Ms. Van Vu, that she gave him his lunch money, and that she provided him with a place to stay, her house in California, for nothing, apparently out of the goodness of her heart.

Jacobs testified that he owned nothing but the car, that his 49 percent interest in Kimmex was valueless. He asserted his interests in the tennis club, the Greshville Inn and The Mad Hatter were valueless. He skipped completely

over his IRA account and its value and his other investments. He was, according to him, all but destitute and penniless.

[*385] We cannot find the exact measure of Jacobs' wealth because he lied to the court about [**41] his wealth and attempted to conceal it. He stone-walled plaintiff's efforts to obtain information about it. He refused to appear for depositions after this court had determined that he was liable for punitive damages and before the damage phase of this trial began, by which means plaintiff sought to ascertain Jacobs' net worth. He refused to honor the subpoena duces tecum served upon him requiring him to bring certain information to trial.

The evidence presented at trial established that Jacobs has substantial assets available to him. Jacobs can draw upon the following accounts:

THE KIMMEX ACCOUNTS WITH THE

Royal Bank in Reading, Pennsylvania;

Royal Bank in Texas;

THE NFW ACCOUNT WITH THE ROYAL BANK IN READING;

THE NKM ACCOUNT WITH THE ROYAL BANK IN READING;

CERTIFICATE OF DEPOSIT FOR $140,000 HELD BY JACOBS AND MS. VAN VU IN THE ROYAL BANK IN READING;

CAPITAL ACCOUNT IN THE NAME OF NKM FOR $172,000.

JACOBS HAD A 1/2 INTEREST IN THE HILLCREST RACQUET CLUB WHICH WE FIND HE STILL RETAINS.

JACOBS HAS EXPECTED INCOMING FUNDS OF $225,000 FOR AN INCOME TAX REFUND.

IN 1995, JACOBS RECEIVED $156,000 AS INCOME FROM NGN, INTEREST OF $46,500, [42] DIVIDENDS OF $86,100, AND A CAPITAL GAIN OF $43,000.**

IN 1997, JACOBS RECEIVED $180,000 INCOME FROM NV SPORTSWEAR AND KIMMEX.

[*386]

JACOBS AND HIS WIFE RECEIVE $2,000 PER MONTH ON THE MORTGAGE THEY HOLD ON THE GRESHVILLE INN.

JACOBS RECEIVES $2,400 PER MONTH FROM NFW RENTALS.

JACOBS, THROUGH NKM, RECEIVED RENTAL PAYMENTS FROM HILLCREST IN THE AMOUNT OF $13,000 PER MONTH. NKM HAS TOTAL ASSETS OF $1.5 MILLION. HILLCREST, THE OPERATING ENTITY OF NKM, HAD TOTAL RECEIPTS OF $438,000 IN 1998.

JACOBS PLEDGED ACCOUNTS WORTH $450,000 AS COLLATERAL FOR A LOAN FOR HILLCREST IN THE SUMMER OF 2000.

JACOBS HAD AN OWNERSHIP INTEREST IN NKM FOR $90,000 WHICH WE FIND HE STILL RETAINS.

JACOBS AND HIS WIFE HAVE THE FOLLOWING JOINT PROPERTY:

$159,000 with Investor's Trust;

$337,600 with Penn Securities;

$160,000 with H & P Management LLP and Republic Bank of Korea.

JACOBS ALONE OWNS TWO ROLLOVER IRAS, THE FIRST WORTH $955,614, MANAGED BY

MR. TOM WEIK, AND THE SECOND INVESTED BY SHEARSON AND WORTH $80,000.

JACOBS AND HIS WIFE PAID $300,000 TO ACQUIRE THE GRESHVILLE INN AND ITS LIQUOR LICENSE, WHICH THEY STILL OWN. [43]**

JACOBS OWNS THE NFW CORPORATION, WHICH OWNS THE BUILDING WHERE THE MAD HATTER RESTAURANT AND SEVERAL APARTMENTS ARE LOCATED.

JACOBS AND HIS WIFE OWN THEIR PRINCIPAL RESIDENCE, WHICH WAS WORTH $650,000 IN 1997.

Jacobs owes debts as follows:

TO FRANK MCCULLOUGH, PURCHASER OF THE FIRST UNION SECURED DEBT, IN THE AMOUNT OF $125,000;

[*387]

LEGAL FEES OF $163,733.19 FOR LITIGATION WITH THE BANK OF NEW YORK.

We turn our attention to the above assets, not because they are subject to, or immune from, Jacobs' creditors, and not because they are owned solely by him, or by him and others, but because they show the monies that he uses and has access to, and, therefore, such assets are a part of the assets which this court can, and will, consider in fixing an appropriate sum for punitive damages.

This court will not permit Jacobs' mendacity, his outright lies, his refusal to honor this court's subpoenas, to now be turned to his benefit, and while we cannot ascertain his precise net worth, we are satisfied that his various business interests, including his arrangements with Ms. Van Vu, give him access to substantial assets. In determining punitive damages, evidence [**44] of net

worth is not mandatory. *Shiner v. Moriarty*, 706 A.2d 1228, 1240 (Pa. Super. 1998). To the extent that it is relevant, we find that the evidence presented on Jacobs' net worth provides us with a sufficient basis to determine the amount of punitive damages appropriate to Jacobs' means. A punitive damage award of $1 million, based on all the factors which we are allowed to consider in arriving at a punitive damage award, is reasonable and proper in this case.

IV. CONCLUSIONS OF LAW

JACOBS' PURSUITS OF HIS SELF-INTERESTS AT THE EXPENSE OF THE MINORITY SHAREHOLDER'S INTERESTS WERE A BREACH OF JACOBS' FIDUCIARY DUTY TO VIENER.

[*388]

JACOBS' COVERT DIVERSION OF NGN'S CASH, EQUIPMENT, MACHINERY AND FINANCIAL RESOURCES FOR HIS OWN SELF-INTERESTS CAUSED OR CONTRIBUTED TO THE DESTRUCTION OF VIENER'S INTERESTS IN THE PROFITABLE APPAREL BUSINESSES FOUNDED OR CAPITALIZED BY VIENER'S FAMILY.

VIENER IS ENTITLED TO RELIEF AS A RESULT OF A SYSTEMATIC FREEZE-OUT IMPLEMENTED BY MAJORITY SHAREHOLDERS JACOBS AND RUSH.

DECEMBER 31, 1994 IS THE APPLICABLE VALUATION DATE TO DETERMINE THE VALUE OF VIENER'S INTERESTS IN NGN AND RGC.

THE SHAREHOLDER AGREEMENT [45] IS INAPPLICABLE IN DETERMINING THE VALUE OF VIENER'S INTERESTS UNDER THE FACTS OF THIS CASE.**

EXPERT EDWARD WILUSZ' APPLICATION OF CONVENTIONAL VALUATION TECHNIQUES TO FOUR PRIOR YEARS INCOME FOR NGN AND COMBINED FINANCIAL STATEMENTS OF NGN AND RGC WAS SUFFICIENT TO ESTIMATE THE VALUE OF NGN AND RGC AS OF DECEMBER 31, 1994.

APPLYING THE 35 PERCENT DISCOUNT TO VIENER'S OWNERSHIP INTERESTS ADEQUATELY TAKES INTO ACCOUNT THE ILLIQUIDITY OF THE MINORITY SHARES, THE ADVERSARIAL ATMOSPHERE OF THE PROCEEDINGS, ANY KNOWN AND UNKNOWN CONTINGENCIES AS OF DECEMBER 31, 1994, ANY IMPACT WHICH COULD RESULT FROM FRIEDMAN'S 25 PERCENT OWNERSHIP INTEREST IN RGC AS WELL AS ANY NEGATIVE IMPACT LOSSES FROM RGC WOULD HAVE ON THE VALUATION OF VIENER'S INTEREST IN NGN.

ACCORDINGLY, VIENER IS AWARDED $1.2 MILLION IN COMPENSATORY DAMAGES, REFLECTING THE DISCOUNTED VALUE OF HIS OWNERSHIP INTEREST IN NGN AND RGC AS OF DECEMBER 31, 1994.

[*389]

THE NATURE OF THE CONDUCT OF JACOBS IN CREATING FRAUDULENT SCHEMES TO CIRCUMVENT COMPANY POLICY IS OUTRAGEOUS.

THE NATURE OF THE CONDUCT OF JACOBS IN DIVERTING NGN'S CASH, EQUIPMENT, MACHINERY AND FINANCIAL RESOURCES TO MS. VAN VU AND THE [46] OFFSHORE**

FACILITY THEY OWN TOGETHER IS OUTRAGEOUS.

THE HARM CAUSED TO VIENER IS SIGNIFICANT BECAUSE HE HAS LOST HIS FINANCIAL INTEREST IN THESE BUSINESSES, THE FAMILY BUSINESS ITSELF, AND HAS INCURRED SUBSTANTIAL LEGAL BILLS AND OTHER DEBTS.

PUNITIVE DAMAGES ARE APPROPRIATE TO PUNISH JACOBS FOR HIS OUTRAGEOUS CONDUCT.

JACOBS HAS STRUCTURED HIS FINANCIAL AFFAIRS TO LIMIT THE AWARD OF PUNITIVE DAMAGES TO LITTLE OR NOTHING.

JACOBS IS A WEALTHY MAN WITH ACCESS TO ASSETS WORTH OVER $4 MILLION.

THE COURT WILL NOT BE DETERRED FROM FIXING AN APPROPRIATE PUNISHMENT BECAUSE JACOBS REFUSED TO FULLY DISCLOSE HIS CURRENT NET WORTH, INCOME AND PROSPECTS.

AN AWARD OF PUNITIVE DAMAGES IS NECESSARY TO PUNISH JACOBS FOR HIS CONDUCT AND TO DETER OTHERS FROM ENGAGING IN LIKE CONDUCT.

AN AWARD OF $1 MILLION IS ADEQUATE PUNISHMENT IN THIS CASE. ACCORDINGLY, WE ENTER THE FOLLOWING DECREE NISI:

DECREE NISI

And now, April 24, 2001, after a non-jury trial on damages, and in consideration of the foregoing opinion, the court enters an award in the amount of $1.2 million in [*390] favor of the plaintiff, George Viener, and against the defendant, Neal Jacobs, [**47] for breach of fiduciary duty,

and a constructive t`rust is imposed upon Neal Jacobs for this amount.

It is further ordered that punitive damages in the amount of $1 million are awarded in favor of the plaintiff, George Viener, and against the defendant, Neal Jacobs, to punish and deter Jacobs for his outrageous conduct.

Unless post-trial motions are filed to the decree nisi within 10 days from and after the date of service of said decree upon the parties, the decree nisi shall become absolute as of course.

Editor's Note: This case is on appeal to the Superior Court.

APPENDIX C

GEORGE P. VIENER v. NEAL JACOBS, NORMAN RUSH, MICHAEL A. JOFFRED, ALLEN FRIEDMAN, N.G.N., INC., READING GARMENT COMPANY, INC., ELLMAR MANUFACTURING, INC., NAGAN LEASING, INC., READING DYEING AND FINISHING, INC., LITTLE CREEK MILLS, INC., LCMA, INC., AMITY FINISHING, INC., G.N.K. PARTNERSHIP APPEAL OF: NEAL JACOBS

No. 1323 MDA 2001

SUPERIOR COURT OF PENNSYLVANIA

2003 PA Super 324; 834 A.2d 546; 2003 Pa. Super. LEXIS 2782

April 23, 2003, Argued
September 3, 2003, Filed

SUBSEQUENT HISTORY: Appeal denied by Viener v. Jacobs, 2004 Pa. LEXIS 1859 (Pa., Aug. 16, 2004)

PRIOR HISTORY: [***1] Appeal from the Judgment Entered July 12, 2001, In the Court of Common Pleas of Berks County, Civil Division, No. 00-6385. Before SCHAEFFER, J. Viener v. Jacobs, 52 Pa. D. & C.4th 353, 2001 Pa. D. & C. LEXIS 78 (2001)

DISPOSITION: Affirmed in part, reversed in part, and remanded.

LexisNexis(R) Headnotes

COUNSEL: John J. Miravich, Reading, for appellant.

Rees Griffiths, York, for appellee.

JUDGES: Before HUDOCK, TODD and POPOVICH, JJ. OPINION BY POPOVICH, J.

OPINION BY: [**550] POPOVICH

OPINION: Filed: September 3, 2003

[*P1] Neal Jacobs (Jacobs) appeals the Judgment entered on July 12, 2001, in the Court of Common Pleas of Berks County. Upon review, we affirm in part, reverse in part and remand.

[*P2] The tortured procedural history of this case is as follows. George P. Viener (Viener) initiated this action on February 1, 1995, *via* Praecipe for a Writ of Summons. Thereafter, on February 6, 1995, Viener filed a Complaint against his former business partners: Jacobs, Norman Rush (Rush), Michael A. Joffred (Joffred), Allen Friedman (Friedman). The Complaint also named as defendants NGN, Inc. (NGN), a Subchapter S textile corporation, and its following affiliates: Reading Garment Co., Inc. (RGC), Nagan Leasing, Inc. (NLI), Ellmar Mfg., Inc. (EMI),

Energy Knits, Inc. (EKI), Reading Dyeing and Finishing, Inc. (RDFI), Little Creek [***2] Mills, Inc. (LCM), LCMA, Inc. (LCMA), Amity Finishing, Inc. (AFI), and GNK Partnership (GNK). Viener, Jacobs and Rush were officers of NGN, owned equal [**551] shares of the company and owned varying percentages of interest in its affiliates. Friedman owned a 25% interest in RDFI, a 25% interest in LCM, a 20% interest in AFI and a 25% interest in RGC. Joffred was an auditor employed by Beard & Company who audited NGN and later was named Viener's replacement as president of NGN after Viener was fired from NGN.

[*P3] Viener's Complaint alleged that his former business partners conspired to discharge him wrongfully from his position as President of NGN and Secretary/Treasurer of RGC. The Complaint also alleged that Jacobs, Rush and Friedman breached their fiduciary duty to Viener as a minority shareholder and that Jacobs, Rush and Friedman engaged in a civil conspiracy to deprive illegally Viener's rights as a minority shareholder. On March 6, 1995, Jacobs, Rush, Friedman and the corporate defendants filed Preliminary Objections. The trial court granted the Preliminary Objections in part and ordered that the Complaint be dismissed against the corporate defendants due to Viener's failure [***3] to name them in the four counts of the original complaint.

[*P4] Viener filed an Amended Complaint on May 18, 1995. On May 21, 1995, Jacobs, Rush, Friedman and the corporate defendants filed an Answer and Counterclaim. The Answer denied, *inter alia*, any wrongdoing by Jacobs, Rush, Friedman and the corporate defendants. The Answer claimed that Viener was an "at-will" employee, and his employment could be terminated at any time. In addition, the Counterclaim alleged that Viener had misappropriated and diverted corporate assets in excess of $ 20,000 for his

personal benefit.[8] n1 On July 28, 1995, Viener filed a Motion for a Jury Trial, which the trial court granted.

[*P5] The case proceeded through pre-trial motions and discovery and, on April 28, 1997, the parties held a pretrial conference, whereat the parties agreed that the case would be tried without a jury on August 4, 1997, which was later continued to August 5, 1997. It was also agreed at the conference [***4] that Viener would be given leave to file a Second Amended Complaint.[9] Thereafter, on June 12, 1997, Jacobs, Rush, Friedman and the corporate defendants filed two Motions *In Limine* to exclude the testimony of Stephen A. Cohen and Edward Wilusz.[10] These motions were denied by the trial court. Viener then filed a Second Amended Complaint which alleged that Jacobs usurped and appropriated a corporate opportunity of NGN by purchasing a sewing facility in Mexico with Kim Van Vu (Van Vu) to produce garments for NGN that would be accounted separately from other NGN sales.
[***5]

[*P6] By agreement of the parties, the trial court bifurcated the case and began trial on the issue of liability

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[8] This Counterclaim was later withdrawn.

[9] It was agreed at the pretrial conference that Jacobs, Rush, Friedman and the corporate defendants would not file Preliminary Objections to the Second Amended Complaint, and Viener agreed that they would not have to file an Answer. Nevertheless, Jacobs, Rush, Friedman and the corporate defendants filed a Preliminary Objection to the Second Amended Complaint on July 21, 1997, because Viener failed to file the Second Amended Complaint within 20 days as agreed. The trial court did not rule on this Preliminary Objection.

[10] Stephen A. Cohen was to present expert testimony regarding management mistakes made by Jacobs, Rush and Friedman, and Edward Wilusz was to present expert testimony regarding the fair market value of NGN. The trial court did not make a ruling with respect to the Motions *In Limine*.

on August 5, 1997. The trial court deferred disposition regarding the Motions *In Limine* [**552] and instructed the parties to file a joint document indicating both the stipulated findings of fact and those facts which needed to be determined by testimony. The record indicates that the trial court wished to determine whether Jacobs, Rush, Friedman and the corporate defendants were, in fact, liable to Viener prior to deciding the Motions *In Limine*. The parties presented testimony on August 7-12, 1997, but the trial was continued to January 26, 1998, and later continued to April 16-17, 1998. In the interim, on March 4, 1998, the [***6] Honorable Albert Stallone, presiding trial judge, vacated the order scheduling the continuance of trial for April 16th-17th and recused himself due to a perceived conflict of interest. The case was reassigned immediately to the Honorable Forrest G. Schaeffer. Evidently, the Motions *In Limine* were not ruled upon due to the change in jurists and the delay in the continuation of the case thereafter.[11]

[11]Because these Motions *In Limine* were not ruled upon before trial, during trial or after trial, and the testimony they sought to limit was presented at trial, we will consider them constructively denied, and we will consider the issues raised within the Motions preserved.

[*P7] Following reassignment of the case to Judge Schaeffer, on April 15, 1998, the trial court scheduled a trial status conference for May 7, 1998. Thereafter, Viener filed a Petition for the Appointment of a receiver for NGN, LCMA, EMI, RDFI and RGC.[12] The trial court issued a Rule returnable May 17, 1998, and stated that if Jacobs, [***7] Rush, Friedman and the corporate defendants were to file an answer that raised a dispute as to the material facts or issues of law regarding the Petition, an evidentiary hearing would be held on June 5, 1998. Jacobs, Rush and the corporate defendants filed an Answer on May 18, 1998. Thereafter, the scheduled evidentiary hearing was continued from June 5th to July 10, 1998, October 13-14, 1998 and November 6, 1998.[13]

[*P8] Testimony on the Petition for Appointment of a receiver began on August 3, 1999, and was concluded on August 6, 1999. Thereafter, on August 6th, the trial court appointed a liquidating receiver for NGN, LCMA, EMI, RDFI and RGC. On September 3, 1999, the receiver requested authority from the trial court to file for protection pursuant to the United States Bankruptcy Code, [***8] Title 11 U.S.C § 101, *et seq.*, on behalf of NGN, LCMA, EMI, RDFI and RGC, which the trial court granted. Accordingly, the trial court stayed all pending matters with respect to NGN, LCMA, EMI, RDFI and RGC pending the disposition of the bankruptcy proceedings. Rush also filed for protection under the United States Bankruptcy Code on February 25, 2000.

[*P9] Following submission of proposed Findings of Fact and Conclusions of Law from the parties, the trial

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[12] Viener amended his Petition orally to include NGN, which the trial court granted.

[13] Testimony regarding the liability phase of trial was presented on July 10, 1998, October 13-14, 1998, and November 6, 1998.

court entered a Decree *Nisi* setting forth its Findings of Fact and Conclusions of Law with respect to the liability phase of trial on June 30, 2000. The trial court first found that all proceedings against Rush, NGN, RGC, EMI, LCMA and RDFI remained stayed as a result of their bankrupt status. ***See Viener v. Jacobs***, 51 Pa. D.&C. 4th 260, 261 (C.P. Berks, 2000). The suit against Joffred, Friedman, NLI, EKI, RDFI, LCM, AFI and GNK was dismissed because Viener did not present evidence at trial to show that they were liable to Viener. ***Id.***, 51 Pa. D.&C. 4th at 261. Viener's claim for wrongful discharge was dismissed [**553] because it found the claim was, in reality, [***9] a claim against NGN. ***Id.***, 51 Pa. D.&C. 4th at 281. The trial court also dismissed Viener's conspiracy claim against Jacobs, Rush and Friedman because they were acting as agents of NGN when Viener was fired, and, therefore, NGN could not conspire against itself. ***Id.***, 51 Pa. D.&C. 4th at 281. However, the trial court concluded that Jacobs, as majority shareholder, owed a fiduciary duty to Viener, as minority shareholder, and that Jacobs' conduct in "freezing out" Viener was outrageous and oppressive. ***Id.***, 51 Pa. D.&C. 4th at 295. Therefore, the trial court concluded that Jacobs was liable to Viener for compensatory and punitive damages resulting from the breach of fiduciary duty to Viener. ***Id.***, 51 Pa. D.&C. 4th at 298. Lastly, a constructive trust was imposed on Jacobs for the amount of damages to be determined in the damage phase of the trial. ***Id.***, 51 Pa. D.&C. at 299.

[*P10] The damage phase of trial was held on September 7, 8, 12, 20 and 28, 2000. After submissions of Proposed Findings of Fact and Conclusions of Law from the parties, the trial court entered an award [***10] in favor of Viener in the amount of $1.2 million dollars in compensatory damages and $1 million dollars in punitive damages. Jacobs filed Post-Trial Motions, which were

denied by the trial court. Thereafter on July 12, 2001, the Judgment was recorded. Jacobs filed a timely Notice of Appeal to this Court on August 9, 2001, and an ordered statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). On October 11, 2001, before the trial court filed its Pa.R.A.P. 1925(a) Opinion, Jacobs sought Chapter 7 Bankruptcy protection, and this appeal was automatically stayed by the United States Bankruptcy Court for the Eastern District of Pennsylvania. The trial court, nevertheless, filed a Pa.R.A.P. 1925(a) Opinion on October 25, 2001, that addressed Jacobs' issues in the event that his Bankruptcy petition was dismissed. Thereafter, the automatic stay was lifted, and the appeal was reinstated.

[*P11] Appellant presents the following questions for our review:

DID THE TRIAL COURT [ERR] WHEN IT FOUND THAT VIENER WAS FROZEN-OUT OF [NGN]?

DID THE TRIAL COURT [ERR] WHEN IT FOUND THAT JACOBS BREACHED HIS FIDUCIARY DUTY BUT REFUSED TO APPLY THE [*11] BUSINESS JUDGMENT RULE TO JACOBS' CONDUCT?**

DID THE TRIAL COURT [ERR] WHEN IT RELIED ON THE FEDERAL CASE OF [*ORCHARD V. COVELLI*, 590 F. SUPP. 1548 (W.D. PA. 1984)] TO MEASURE DAMAGES RATHER THAN MAKING A SPECIFIC FINDING WHAT DAMAGE, IF ANY, JACOBS CAUSED?

DID THE TRIAL COURT [ERR] WHEN IT RELIED ON VIENER'S DAMAGE EXPERT WHO HAD NO FOUNDATION FOR HIS OPINION?

DID THE TRIAL COURT [ERR] WHEN IT REFUSED TO PERMIT JACOBS TO OFFER EVIDENCE THAT VIENER REMOVED ASSETS OF THE COMPANY?

DID THE TRIAL COURT [ERR] IN AWARDING VIENER [$1 MILLION DOLLARS IN PUNITIVE DAMAGES] WHEN JACOBS' CONDUCT DID NOT MEET THE LEVEL OF OUTRAGEOUSNESS NECESSARY TO AWARD SUCH DAMAGES?

DID THE TRIAL COURT [ERR] BY AWARDING VIENER [$1 MILLION DOLLARS IN PUNITIVE DAMAGES] WHEN VIENER DID NOT PROVE THAT THE CHARACTER OF THE ACT, THE NATURE AND EXTENT OF THE HARM TO VIENER AND THE JACOBS' WORTH WARRANTED SUCH A RECOVERY?

DID THE [TRIAL COURT ERR] BY AWARDING [$1 MILLION DOLLARS IN PUNITIVE DAMAGES] BECAUSE THE AWARD WAS UNCONSTITUTIONAL AS GROSSLY EXCESSIVE BY [554] NOT BEARING A [***12] REASONABLE RELATIONSHIP TO THE FACTS OF RECORD?**

Jacobs' brief, at 3-4.

[*P12] We note first that this appeal arises from the trial court's adjudication of Viener's claim of breach of fiduciary duty. A claim of breach of fiduciary duty sounds in equity, and, as such, our standard of review is limited. ***See Liberty Prop. Trust v. Day-Timers, Inc.***, 2003 PA Super 7, 815 A.2d 1045, 1048 (Pa. Super. 2003). We will reverse only where the trial court was "palpably erroneous, misapplied the law or committed a manifest abuse of

discretion." ***Day-Timers***, 815 A.2d at 1048 (***citing Thermo-Guard, Inc. v. Cochran***, 408 Pa. Super. 54, 596 A.2d 188, 193 (Pa. Super. 1991)). Where there are any apparently reasonable grounds for the trial court's decision, we must affirm it. ***Id.***, 815 A.2d at 1048.

[*P13] We also note that the present case proceeded as a non-jury trial. When reviewing the results of a non-jury trial, we are bound by the trial court's findings of fact, unless those findings are not based on competent evidence. ***Thatcher's Drug Store v. Consolidated Supermarkets, Inc.***, 535 Pa. 469, 477, 636 A.2d 156, 160 (1994). [***13] Absent an abuse of discretion, we are bound by the lower court's assessment of credibility of the parties. ***Id.***, at 477, 636 A.2d at 160.

[*P14] We address Jacobs' first and second claims jointly. In essence, Jacobs contends that the trial court's findings that he and the other shareholders "froze-out" Viener, the minority shareholder, were not supported by the record, and, in any event, the activities of Jacobs and the other majority shareholders were protected by the "business judgment rule."

[*P15] The trial court's Findings of Fact in its Opinion of June 30, 2000, reveal the following: Viener and his father were in the textile business in the Reading area for more than 50 years. Jacobs was employed by the Viener family business and was eventually offered a 20% ownership interest in the Viener family business. Viener and Jacobs began producing garments for a company that employed Rush, who was a college friend of Viener. Together, Viener, Rush and Jacobs decided to begin their own company and formed NGN on January 1, 1983. The three owned 33 1/3% interests in NGN. Viener served as president/secretary/treasurer of NGN, Jacobs and Rush served as vice-presidents. [***14] The three were subject to a shareholder's agreement that guaranteed each

shareholder that he could sell his shares at the current book value of NGN to the other shareholders.

[*P16] The present case arose when Viener expressed concerns in 1994 regarding questionable cash payments authorized by Jacobs, whose duties were to manage manufacturing and quality control, and made by NGN to one of its subcontractors, N.V. Sportswear and its majority shareholder, Van Vu. ***See Viener***, 51 Pa. D.&C.4th at 269. Initially, Viener acquiesced to the unorthodox cash payments based on the advice of Joffred, then NGN's auditor. ***Id.***, 51 Pa. D.&C. 4th at 270. At that time, Rush indicated that he wished to make Joffred an officer in the company. Initially, Viener supported that plan and wanted to employ Joffred as chief financial officer. Shortly thereafter, Jacobs and Rush voted to remove Viener as president of NGN against Viener's wishes and demoted him to vice-president.[14] Joffred then replaced Viener as president of NGN. Eventually, Joffred suspended NGN's practice of making cash payments to subcontractors. Nevertheless, in late 1994, at Jacobs' direction, [***15] Crown-Globe, Inc. [**555] (Crown-Globe), another subcontractor of NGN, generated false invoices of $53,276.59 to reflect "price adjustments" to NGN. ***Id.***, 51 Pa. D.&C. 4th at 272. Thereafter, Jacobs caused NGN to pay the $53,276.59 to Crown-Globe, who in turn repaid Jacobs. Jacobs then paid the $ 53,276.59 directly to Van Vu. ***Id.***, 51 Pa. D.&C. 4th at 273.

[*P17] Viener questioned Joffred *via* e-mail regarding the cash payments. At trial, Joffred confirmed that the invoices were fraudulent and were an inappropriate attempt by Jacobs to divert cash payments to Van Vu and N.V.

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[14] Viener retained the same salary in the vice-president position that he had as president.

Sportswear in contravention of corporate policy. ***Viener***, 51 Pa. D.&C. 4th at 274. Thereafter, Joffred prevented NGN from paying to Crown-Globe a second series of invoices that totaled $48,135.61. Viener was then voted out of his position as vice-president of NGN by Jacobs and Rush [***16] on Joffred's recommendation. Evidence presented at trial indicates that Joffred intended to fire Viener as vice-president for "wasting people's time with questions." N.T. Trial, 8/11/1997, at 134-135. Viener remained on NGN's board of directors after being fired but his participation on the board was limited severely. Following Viener's termination, NGN ceased its regular practice of quarterly board meetings, and the locks and doors at NGN were changed to permit Viener access to NGN's facilities only during hours of regular operation. Employees of NGN were warned that if they spoke to Viener, they would be fired. Finally, Viener was excluded from voting on issues of employee compensation because Jacobs and Rush established a committee consisting of all of the other shareholders, directors and Joffred to handle those matters.

[*P18] In late 1995, following Viener's termination, the sales of both NGN and RGC fell off, and they sustained losses of approximately $ 900,000. In 1996, NGN and RGC lost $2.33 million. At this time, NGN loaned textile equipment valued at approximately $218,000 to Amex, a corporation in Mexico, at Jacobs' request. ***Viener***, 51 Pa. D.&C. 4th at 276. [***17] This equipment was collateral for a loan held with CoreStates Bank, and the loan documents with CoreStates Bank prevented the transfer of these assets. Moreover, despite dwindling capital accounts, Jacobs withdrew $202,216.67 from his loan account for the

purpose of purchasing the equipment loaned to Amex.[15] n8 Neither the equipment purchased nor the funds used to purchase the equipment were returned to NGN by Jacobs, instead, part of the equipment located at Amex was transferred to Kimmex, a second facility in Mexico owned by Jacobs and Van Vu.[16] n9 The balance of the equipment at Amex was sold, and the funds acquired from the sale were reinvested in equipment for Kimmex.
[***18]

*P19] While the Kimmex transactions were taking place, Jacobs allowed his responsibilities at NGN to lax. As a result, J.C. Penney, a major client of NGN, demanded that Joffred take over responsibility for quality control because of its concerns regarding the quality of NGN's merchandise and the timeliness of deliveries. ***Viener***, 51 Pa. D.&C. 4th at 278. Joffred took over quality control from Jacobs, [**556] but NGN's viability continued its rapid decline, and the company ceased operations on August 31, 1997. ***Id.***, 51 Pa. D.&C. 4th at 279-280.

[*P20] We note first that Jacobs frames his argument as a challenge to the trial court's legal determination that Viener was "frozen out" of NGN. However, an analysis of Jacobs' brief indicates that a large part of his argument with respect to his first two claims attacks the factual determinations of the trial court without contending expressly that [***19] the trial court's factual findings were

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[15]The shareholder loan accounts contributed to NGN's working capital and earned interest at 12 *per annum*. The shareholders took their profit distributions and loaned money back to NGN as part of its capital account. There were no agreements or understandings as to the terms or timing of loan payments. The shareholders made advances or withdrawals irregularly. ***Viener***, 51 Pa. D.&C. 4th at 267.

[16]We note that Viener was never given an opportunity to invest in Kimmex.

unsupported by the record. As such, Jacobs presents an alternative interpretation of the facts of this case. However, we will not find that the trial court abused its discretion where there is a mere "difference of opinion" regarding an interpretation of the facts. Rather, an abuse of discretion is found only in flagrant cases where there is *not* a substantial ground for difference of opinion. ***Miller v. Krug***, 255 Pa. Super. 39, 386 A.2d 124 (Pa. Super. 1977). We have reviewed the Findings of the trial court and have determined that they are supported by the record, and we are therefore satisfied that the trial court did not abuse its discretion with respect to the facts that it found. ***See Thatcher's Drug Store***, at 477, 636 A.2d at 160.

[*P21] It is axiomatic that majority shareholders have a duty not to use their power in such a way to exclude minority shareholders from their proper share of benefits accruing from the enterprise. ***See Ski Roundtop, Inc. v. Hall***, 265 Pa. Super. 266, 401 A.2d 1203, 1209 (Pa. Super. 1979). "[The aforementioned principle] does not [***20] mean that majority shareholders may never act in their own interest, but when they do act in their own interest, it must also be in the best interest of all shareholders and the corporation." ***See Ferber v. American Lamp Corp.***, 503 Pa. 489, 496, 469 A.2d 1046, 1050 (1983). Pennsylvania law holds that an attempt by a group of majority shareholders to "freeze out" minority shareholders for the purpose of continuing the enterprise for the benefit of the majority shareholders constitutes a breach of the majority shareholders' fiduciary duty to the minority shareholders. ***See Weisbecker v. Hosiery Patents, Inc.***, 356 Pa. 244, 258, 51 A.2d 811, 817 (1947).

[*P22] In the present case, the record indicates that Jacobs, in conjunction with Rush, acted to "freeze out" Viener, the minority shareholder, from obtaining a proper share of the benefits that accrued from the enterprise. As

found by the trial court, after Viener complained about Jacobs' practices to Joffred, he was removed from his position of responsibility and prevented from providing a role in the governance of the corporation which his expertise helped build due to "wasting [***21] peoples' time with questions." Following Viener's termination in 1995, his chief means of access to the company's financial documents was *via* a discovery order from the trial court and periodic financial statements. Further, at Jacobs' direction and with Rush's assent, NGN's assets and opportunities were squandered while the company was in dire financial straights in a bizarre corporate machination designed to benefit Jacobs and his confidant, Van Vu. This evidence alone is sufficient to demonstrate that Jacobs (and Rush) "froze out" Viener from a meaningful role in NGN's operation. ***See, e.g.,*** 15 Pa.C.S.A. § 1767 comment (a "freeze out" occurs in closely held corporation when minority shareholder is removed from office or his power or compensation is substantially diminished).

[*P23] The trial court was not swayed by the testimony presented with regard to Viener's alleged mismanagement of NGN, no doubt due to both the evidence presented [**557] by Viener indicating that Jacobs (and Rush) limited Viener's role as a shareholder-director, and the self-dealing practices of Jacobs that occurred before and after Viener's termination. Of course, the [***22] trial court, as fact-finder, was free to believe all, part or none of the testimony presented and weigh its credibility. ***See Majczyk v. Oesch***, 2001 PA Super 378, 789 A.2d 717, 726 (Pa. Super. 2001). The trial court heard all testimony, weighed it and found that Jacobs' testimony was not credible. Therefore, we discern no error on the part of the trial court when it concluded that Jacobs breached his fiduciary duty to Viener.

[*P24] We are also satisfied that the trial court was correct when it determined that the "business judgment rule" did not insulate Jacobs (and Rush) from liability for "freezing out" Viener. The "business judgment rule" insulates an officer or director of a corporation from liability for business decisions made: (1) in ***good faith***; (2) where the director or officer ***is not interested in the subject of the business judgment***; (3) is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances; and (4) rationally believes that the business judgment in question is in the best interests of the corporation. ***See Cuker v. Mikalauskas***, 547 Pa. 600, 692 A.2d 1042 (1997) [***23] (emphasis added).

[*P25] The crux of this case is Viener's contention that he was "frozen out" of meaningful participation in the governance of the corporation that he cofounded as a result of the complaints he had with respect to inappropriate business practices by NGN that were authorized by Jacobs and assented to by Rush that led to the eventual decline of the NGN and its affiliates. Therefore, the "business judgment rule" would not insulate Jacobs (and Rush) from liability in this case, because the issue is the prevention of a shareholder-director's participation in the governance of a closely held corporation, as opposed to the power of the corporation to manage its property and conduct its business affairs. As such, judicial determination of this issue requires an analysis of the equitable relationship between Viener and Jacobs and, therefore, does not implicate matters left to the business judgment of NGN's corporate officers or directors. ***Cf. Warehime v. Warehime***, 2001 PA Super 141, 777 A.2d 469, 479 (Pa. Super. 2001) (judicial review of equitable corporate obligations does not impute the "business judgment rule") (citation omitted). Accordingly, [***24] Jacobs' first and second claims fail.

[*P26] Jacobs' remaining claims challenge the trial court's determination of damages. Jacobs first contends that the trial court erred when it relied on ***Orchard v. Covelli***, 590 F. Supp. 1548 (W.D. Pa. 1984). We note that Jacobs failed to present this argument to the trial court in his Pa.R.A.P. 1925(b) Statement, and, therefore, it is waived for purposes of review. ***See McKeeman v. CoreStates Bank, N.A.***, 2000 PA Super 117, 751 A.2d 655, 658 (Pa. Super. 2000) (citation omitted).

[*P27] Jacobs contends next that the trial court erred in its calculation of compensatory damages because Viener failed to prove the extent and amount of damages resulting from Jacobs' actions. ***See, e.g., Gordon v. Trovato***, 234 Pa. Super. 279, 338 A.2d 653, 654 (Pa. Super. 1975) (plaintiff must establish by evidence such facts as will furnish basis for legal assessment of damages). Jacobs also argues that the trial court found improperly that he alone was required to pay damages to Viener.

[*P28] After a review of the record, we are satisfied that the trial court did not err when [***25] it calculated the compensatory damages applicable to Jacobs in this case. [**558] The record reveals that the trial court ordered Jacobs to pay $1.2 million dollars in compensatory damages, which represented the fair value of Viener's interests in NGN and RGC as of December 31, 1994. The trial court did not assign the "book value" valuation to Viener's stock provided by the shareholder agreement between Viener, Jacobs and Rush because the shareholder agreement was silent regarding situations in which a shareholder was terminated involuntarily. Therefore, the agreement did not apply. ***See Seven Springs Farm Inc. v. Croker***, 2000 PA Super 72, 748 A.2d 740, 744 (Pa. Super. 2000) (contract that fails to provide for a specific contingency is silent, not ambiguous). Nevertheless, when seeking a settlement of this case, Jacobs and Rush offered

to pay Viener only the "book value" of the stock instead of its actual value because of the shareholder's agreement, and, accordingly, Viener was effectively compelled to retain his illiquid investment. Therefore, the trial court set December 31, 1994, as the proper date for valuation of Viener's stock, because December 31st was prior [***26] to his "freeze out" and, thus, represented a date when Viener still reaped the benefits of NGN and RGC. The trial court concluded correctly that the proper method to calculate damages was to determine the actual value of Viener's stock prior to the date of his discharge because to choose a date after discharge would allow Jacobs to profit from his oppressive conduct towards Viener.

[*P29] Jacobs' argument that the trial court erred when it found that he alone was required to pay damages to Viener is entirely without merit. Jacobs' codefendants were either dismissed due to their bankrupt status or because they were not liable to Viener. If the case could have proceeded against Rush, the other majority director, the trial court could have found him jointly and severally liable to Viener with Jacobs. However, Rush was insulated from adjudication as a result of the automatic stay. Thus, Jacobs remained as the sole non-bankrupt defendant, and, consequently, damages were assessed properly against him.[17]

[***27]

[*P30] Next, Jacobs claims that the trial court erred in relying on Viener's expert witness, Edward Wilsuz, who valued Viener's stock as of December 31, 1994, to

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[17]Jacobs also argues that the trial court failed to recognize that Viener incurred a tax-benefit from the losses incurred by NGN and its affiliates while he held the stock. This argument is without merit. The purpose of Viener's investment was to generate profit, not to incur a tax-benefit from the loss of his investment.

determine damages. Jacobs claims that Wilsuz's estimation of the value of Viener's stock was not based on sufficient facts because he was unaware that NGN and RGC filed separate tax returns and that Viener did not have a 33 1/3% interest in RGC. It is well settled that expert testimony is incompetent if it lacks an adequate basis in fact. The expert is allowed only to assume the truth of testimony already in evidence. ***Hussey v. May Dep't Stores, Inc.***, 238 Pa. Super. 431, 357 A.2d 635, 637 (Pa. Super. 1976). While an expert's opinion need not be based on an absolute certainty, an opinion based on mere possibilities is not competent evidence. ***Niggel v. Sears, Roebuck and Co.***, 219 Pa. Super. 353, 281 A.2d 718 (Pa. Super. 1971). This means that expert testimony cannot be based solely upon conjecture or surmise. An expert must do more than guess. His or her assumptions must be based upon such facts as the jury would be warranted in finding from the evidence. [***28] ***Houston v. Canon Bowl, Inc.***, 443 Pa. 383, 278 A.2d 908 (1971).

[*P31] [**559] In his determination of Viener's stock value, Wilsuz utilized three distinct methods. In the first method, called an "asset value" approach, Wilsuz relied on both NGN's tax returns for the years 1990-1994 and a joint financial statement produced in 1997. The second method of valuation, the "comparative company" approach consisted of a comparison of NGN to 10 similar apparel companies. This method led to a value of $6 million dollars, which the trial court did not adopt. The final method of valuation, upon which Wilsuz based his conclusion of value, was the "present value of future earnings" approach. This method consisted of an examination of NGN and RGC's earnings prior to 1995 and a mathematical prediction of value based on those earnings. Wilsuz concluded that, based on this approach, NGN and RGC were worth $5.5 million dollars in 1994. Wilsuz then

divided $5.5 million dollars by three (to reflect his assumption that Viener owned 1/3 of both companies), which equaled $1.835 million dollars. Wilsuz then applied a 35% "minority shareholder's discount" to the $1.835 million [***29] dollar figure (to reflect the illiquid nature of the stock) leading him to conclude that Viener's stock in NGN and RGC was worth $1.2 million dollars on December 31, 1994.

[*P32] Thus, it is clear that Wilsuz based his calculations on the assumption that there were three investors in RGC (instead of four). N.T. Damage Trial, 9/7/2000, at 233-234. The trial court informed Wilsuz that, in fact, RGC had four directors. In an effort to address Wilsuz's computational error Viener asked hypothetically whether the value of RGC would affect NGN's value if RGC operated at a "break-even" level. N.T. Damage Trial, 9/8/2000, at 254. Wilsuz opined that his assessment of NGN's value, and, thus, Viener's stock value, would not change despite his erroneous assumption that Viener held 1/3 interests in both companies, provided that RGC operated on a "breakeven " basis. N.T. Damage Trial, 9/8/2000, at 261.

[*P33] Wilsuz's hypothetical assumption does not suffice to "cure" his error in the calculation of the value of Viener's stock. There is no evidence of record to indicate that RGC was a "break-even" company, and it is clear that RGC's value in 1994 would have either a positive or negative [***30] effect on Viener's aggregate stock value. As our Supreme Court held in ***Houston***:

> The facts which are assumed to be true for purposes of a hypothetical question put to an expert witness must be put in evidence by witnesses other than the expert himself. The opinion of the expert does not constitute

> proof of the existence of facts necessary to support the opinion.

Houston, at 385-386, 278 A.2d at 910 (citation and quotation marks omitted).

[*P34] As there were no facts present in the record to suggest that RGC was a "break even" company, we conclude that Wilsuz did not have sufficient facts on which to base his opinion of Viener's stock value, and, accordingly, the trial court's assessment of damages is erroneous. ***See Houston***, at 385, 386, 278 A.2d at 910. Further, because Wilsuz failed to assess a separate value of RGC, it is impossible for this Court to correct his computational error with respect to the percentage of Viener's ownership in RGC. Therefore, we are constrained to reverse the trial court's compensatory damage award and remand the case so the trial court may, with sufficient facts, determine the [***31] proper amount of compensatory damages.

[*P35] Jacobs' next claim alleges that the trial court erred when it refused to allow Jacobs to present evidence that [**560] Viener removed assets of NGN as a set-off of the damage award. Jacobs attempted to raise this issue *via* a Motion to Amend his Answer for a Set-Off Claim at the commencement of the damages trial. Whether a party may amend pleadings is a matter of judicial discretion. ***See Carpitella v. Consolidated Rail Corp.***, 368 Pa. Super. 153, 533 A.2d 762, 763 (Pa. Super. 1987). Amendments should be allowed at any stage of the adversary process to secure a decision of the case on its merits, unless unfair surprise or prejudice to the other party would result or the proposed amendment is against a positive rule of law. ***Id.***, 533 A.2d at 763. If the amendment contains allegations which could have been included in the original pleading, as is the usual case, then the question of prejudice is presented by the *time*

at which it is offered rather than by the substance of what is offered. ***See Bata v. Central-Penn National Bank of Philadelphia***, 448 Pa. 355, 293 A.2d 343, 357 (Pa. Super. 1972). [***32] The possible prejudice, in other words, must stem from the fact that the new allegations are offered *late* rather than in the original pleading. ***Bata***, 293 A.2d at 357.

[*P36] In the present case, Jacobs had several months following the end of the liability phase of trial and the commencement of the damages phase of trial to amend his Answer, yet he did not, leaving Viener unprepared to defend himself against the allegations contained in the Motion. Further, as the trial court observed, NGN's property interests were being handled by the US Bankruptcy Trustee, and the trial court was without jurisdiction to entertain the claim. Therefore, we are satisfied that the trial court was correct in its denial of Jacobs' Motion because it caused an unfair surprise and prejudice to Viener. Accordingly, we dismiss Appellant's claim.

[*P37] Jacobs' remaining issues challenge the trial court's award of punitive damages. We are able to analyze the legal question of whether it was proper for the trial court to assess punitive damages despite our determination that the trial court's compensatory damage calculation was erroneous. ***See, e.g., Kirkbride v. Lisbon Contractors, Inc.***, 521 Pa. 97, 102, 555 A.2d 800, 803 (1989) [***33] (basis for punitive damages is derivative of *cause of action*, not compensatory damage award).

[*P38] In ***Judge Tech. Servs. v. Clancy***, 2002 PA Super 391, 813 A.2d 879 (Pa. Super. 2001), we stated:

> Punitive damages are awarded to punish a defendant for certain outrageous acts and to deter him **or others** from engaging in

similar conduct. Under Pennsylvania law, a reasonable relationship must still exist between the nature of the cause of action underlying the compensatory award and the decision to grant punitive damages.

[ ] If no cause of action exists, then no independent action exists for a claim of punitive damage since punitive damages is only an element of damages. To this extent, punitive damages must, by necessity, be related to the injury-producing cause of action.

The degree of reprehensibility is the primary indicator of the reasonableness of a punitive damages award. The reprehensibility inquiry takes into consideration the fact that some wrongs are more blameworthy than others.

Importantly,

The standard under which punitive damages are measured in Pennsylvania requires analysis [***34] of the following factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.

[ ]. Moreover, in Pennsylvania, punitive damages are awarded for outrageous conduct, that is, for acts done with [**561] a bad motive or with a reckless indifference to the interests of others. An amount of an award of punitive damages will not be reversed unless it shocks the Court's sense of [conscience].

Judge Tech. Servs., 813 A.2d at 888-889 (citations and quotation marks omitted) (emphasis in original).

[*P39] Jacobs argues that our holding in ***Pittsburgh Live, Inc. v. Servov***, 419 Pa. Super. 423, 615 A.2d 438 (Pa. Super. 1992), requires this Court to reverse its award of punitive damages. We disagree. In ***Servov***, we held that when fraud is the basis of compensatory damages, the same fraudulent conduct is not sufficient to base an award of punitive damages without a showing of acts of malice, vindictiveness or a wholly wanton disregard of the rights of others. ***Servov***, 615 A.2d at 442. We have reviewed the record of this case extensively, and we are [***35] satisfied that the trial court acted properly in assessing punitive damages against Jacobs. As the facts presented above demonstrate, Jacobs' actions (with Rush's assent) led to the usurpation of Viener's right to participate in the governance of a corporation that Viener co-founded. As the trial court found, Jacobs' misuse of corporate funds and property coupled with his failure to undertake sufficient measures to procure the continued success of NGN led to its ultimate failure. We agree with the trial court's conclusion that minority shareholders in closely-held corporations are particularly vulnerable to this type of wanton neglect and bad faith, and it is therefore necessary to punish this behavior to ensure that it will not occur in future cases.

[*P40] In its consideration of whether to impose punitive damages, the trial court also examined Jacobs' personal wealth. Jacobs claims that the trial court erred in including several assets held jointly with his wife and others in the computation of his personal wealth for purposes of determining the proper amount of punitive damages. This argument is without merit. Merely because an asset is not subject to levy and execution does [***36] not mean that it cannot be utilized to determine an

individual's personal wealth. Jacobs also presents several other arguments that the trial court miscalculated his liabilities in its determination of punitive damages. These arguments are unavailing and are contrary to the facts found by the trial court. Therefore, we dismiss them. Lastly, we note that evidence of personal wealth is not mandatory in the determination of punitive damages. ***See Shiner v. Moriarty***, 706 A.2d 1228, 1242 (Pa. Super. 1998). Rather, the polestar for the trial court's analysis is the degree of the defendant's reprehensible conduct. ***Shiner***, 706 A.2d at 1241. As indicated above, we are satisfied that the trial court did not abuse its discretion when it found Jacobs' conduct reprehensible such that punitive damages were proper to deter Jacobs and others from engaging in the same type of conduct. ***See Judge Tech. Servs.***, 813 A.2d at 888. Accordingly, Jacobs' claim fails.

[*P41] Nevertheless, because we find it necessary to remand for a recalculation of compensatory damages, we do not reach Jacobs' argument that the *amount* of punitive [***37] damages awarded was unconstitutionally excessive. We are guided in our judgment by the recent decision of the United States Supreme Court in ***State Farm Mutual Automobile Ins. Co., v. Campbell***, 155 L. Ed. 2d 585, 538 U.S. 408, 123 S. Ct. 1513 (2003). Writing for the Court, Mr. Justice Kennedy stated, "Our jurisprudence and the principles it has now established demonstrate [ ] that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." ***State Farm***, at ___, [**562] 123 S. Ct. at 1524. The current ratio between punitive damages and compensatory damages is less than a 1 to 1 ratio. However, as the ratio between punitive damages and compensatory damages in this case may change as a result of our remand, we reach a decision only

as to the *propriety* of punitive damages in this case so that, on remand, the trial court may recalculate the *amount* of the punitive damage award, if necessary, to comport with Mr. Justice Kennedy's admonition.

[*P42] In sum, we affirm the judgment in part, but we remand for a proper assessment of the value [***38] of NGN and RGC as of December 31, 1994, and a recalculation of compensatory and, potentially, punitive damages to reflect Viener's proper share of ownership in each company.

[*P43] Judgment affirmed in part, reversed in part. Remanded for proceedings consistent with this Opinion. Jurisdiction relinquished.

APPENDIX D

GEORGE P. VIENER, v. NEAL JACOBS, NORMA RUSH, MICHAEL A. JOFFRED, ALLEN FRIEDMAN, N.G.N., INC., READING GARMENT COMPANY, INC., ELLMAR MANUFACTURING, INC., NAGAN LEASING, INC., READING DYEING AND FINISHING, INC., LITTLE CREEK MILLS, INC., LCMA, INC., AMITY FINISHING, INC., G.N.K. PARTNERSHIP, PETITION OF: NEAL JACOBS

No. 940 MAL 2003

SUPREME COURT OF PENNSYLVANIA

2004 Pa. LEXIS 1859

August 16, 2004, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Petition for Allowance of Appeal from the Order of the Superior Court. Viener v. Jacobs, 2003 PA Super 324, 834 A.2d 546, 2003 Pa. Super. LEXIS 2782 (Pa. Super. Ct., 2003)

OPINION: ORDER

PER CURIAM

AND NOW, this 16th day of August, 2004, the Petition for Allowance of Appeal is hereby DENIED